Supreme Court, U.S.
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Nos. 87-1022, 87-1112

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, ANDREW STEIN, individually and as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, DAVID N. DINKINS, STANLEY SIMON, CLAIRE SHULMAN, RALPH J. LAMBERTI, each individually and as Borough Presidents of the boroughs of the City of New York,

Appellants,

—and—

ROBERT A. STRANIERE, individually and as a member of the New York State Assembly,

Intervenor-Appellant,

—against—

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Appellees.

FRANK V. PONTERIO,

Intervenor-Appellant,

—against—

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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APPEAL DOCKETED DECEMBER 17, 1987
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Affidavit of Frank V. Ponterio, Read in Opposition to Plaintiffs' Motion for Summary Judgment on Remand from the Second Circuit, dated January 24, 1984

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81-CV-3920 (E.R.N.)

BEVERLY MORRIS, JOY CLARKE HOLMES, JOANNE OPLUSTIL,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, CAROL BELLAMY, individually and as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, ANDREW STEIN, STANLEY SIMON, DONALD MANES, ANTHONY GEATA, each individually and as Borough Presidents of the Boroughs of the City of New York,

Defendants,

FRANK V. PONTERIO and ROBERT STRANIERE,

Intervenor-Defendants.

Dated: January 24, 1984

FRANK V. PONTERIO, pro se
Intervenor-Defendant
766 Pelton Avenue
Staten Island, New York 10310

Affidavit of Frank V. Ponterio in Opposition to Plaintiffs' Motion for Summary Judgment

State of New York
County of Richmond ss.:

FRANK V. PONTERIO, an attorney duly licensed to practice law in the State of New York, being duly sworn, deposes and says:

1. I am an intervenor-defendant in this action and have previously submitted my credentials to this Court.

2. This affidavit and accompanying memorandum of law are submitted in opposition to plaintiffs' motion for summary judgment and in further support of my motion to deem issues resolved.

3. Upon appeal of the decision of this Court that the Board is not subject to one person, one vote principles, plaintiffs asked the U.S. Court of Appeals for the Second Circuit to direct entry of summary judgment based upon plaintiffs' strained application of the *Abate** test to the Board which purported to show a facially unconstitutional malapportionment. That Court rejected plaintiffs' plea and directed this Court to:

a) Devise an appropriate methodology for analyzing apportionment of the Board,

b) Employ such methodology to measure the degree of malapportionment of the Board, and

c) Rule on the policies and interests which the Supreme Court has held may justify deviations from the literal one person, one vote formula.

4. Plaintiffs' memorandum of law and accompanying papers, and the memorandum of law of amicus curiae Citi-

* *Abate* v. *Mundt*, 403 U.S. 182 (1971).

Affidavit of Frank V. Ponterio in Opposition to Plaintiffs' Motion for Summary Judgment

zens Union are totally non-responsive to the Court of Appeals' direction on remand. On the issue of measurement of malapportionment, plaintiffs have resubmitted the same approach previously argued before this Court (now in two variations as Methods 3 and 5) in which city-wide votes are allocated to the boroughs. Plaintiffs also offer a second approach (in three variations as Methods 1, 2, and 4) which deals with only borough votes. Both approaches have already been tacitly rejected by the Court of Appeals. Moreover, plaintiffs' own expert, Prof. Steven J. Brams, unqualifiedly rejects methods 3 and 5, thus contradicting the fundamental premise of the approach plaintiffs have taken since the inception of this action. Methods 1, 2, and 4 are essentially a single method with inconsequential variations. These methods ignore altogether the city-wide votes contrary to the Court of Appeals' direction to examine the ". . . combination of at-large and local seats, in the context of the voting procedures of the Board", *Morris* v. *Board of Estimate*, 707 F.2d 686, 690. Furthermore, this Court rejected an identical approach, applied to the City Council, in *Andrews* v. *Koch*, 528 F.Supp. 246. The variations involve the particular measure used to quantify malapportionment: viz., population ratios in method 1; percent deviations from average of population-per-representative ratios in method 2; and percent deviations from average of representative-per-population ratios in method 4. Since the measures used in methods 2 and 4 are merely mathematical reciprocals of each other, the results of one method follow by arithmetic alone form the results of the other and no different substantive principles are involved. The same is true of methods 3 and 5 in which city-wide representation is allocated among boroughs proportional to

borough populations. Both these methods were implicitly rejected by the Court of Appeals' refusal to direct summary judgment in favor of plaintiffs on the strength of plaintiffs' Method 3 analyses.

5. In computing percent deviations in Methods 4 and 5, plaintiffs have committed a basic blunder indicative of a lack of understanding of percent computations. In tables on page 34 of plaintiffs' memorandum of law, plaintiffs have computed percent deviations for a different base in each case. A fundamental principle of arithmetic requires that a consistent set of percents must be computed for a common base.* Exhibit 1, selected pages from an ele-

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* To illustrate, suppose one wishes to determine the percent deviations of two numbers (e.g., 50 and 150) from a third number (e.g., 100). The correct answer is that both deviations are 50% (with opposite signs), i.e., 50 is 50% less than 100 ($\frac{50-100}{100} \times 100\% = -50\%$) and 150 is 50% more than 100 ($\frac{150-100}{100} \times 100\% = +50\%$). It is incorrect to describe the two percent deviations using different bases (as plaintiffs have done), i.e., to compute the deviation of 50 from 100 using 50 as the base and to compute the deviation of 150 from 100 using 150 as the base. This would result in the following wrong answer: 50 is 100% less than 100 ($\frac{50-100}{50} \times 100\% = -100\%$) and 150 is 33⅓ more than 100 ($\frac{150-100}{150} \times 100\% = +33\frac{1}{3}\%$). In dealing with differences Plaintiffs are also apparently confused by reciprocals. Note that if one wishes to compute the percent differences of the reciprocals of the illustrative numbers (i.e., 1/50 and 1/150 vs. 1/100), the two correct percent deviations are *not* the same: 1/50 is 100% more than 1/100 ($\frac{1/50-1/100}{1/100} \times 100\% = +100\%$) and 1/150 is 33⅓% less than 1/100 ($\frac{1/150-1/100}{1/100} \times 100\% = -33\frac{1}{3}\%$).

mentary-school-teachers' arithmetic text, cautions against plaintiffs' pitfall. For the benefit of the Court, I provide the correct computations for plaintiffs' analyses in Tables 1 and 2. This is done for reference only since, quite apart from these numerical results, plaintiffs' methods themselves are not valid as applied to the Board.

TABLE 1

Plaintiffs' Method 4 Analysis

			Deviation from Average	
Borough	Population	Share	Plaintiffs' Values	Correct Values*
Brooklyn	2,230,936	.000000448	—57.7%	— 36.6%
Queens	1,891,325	.000000538	—33.7%	— 25.2%
Manhattan	1,427,533	.0000007	—	— 0.9%
Bronx	1,169,115	.000000855	+17.4%	+ 21.0%
Staten Island	352,121	.00002839	+75.2%	+301.6%

* Values also include correction of minor rounding errors in Plaintiffs' "share" values.

TABLE 2

Plaintiffs' Method 5 Analysis

				Deviation from Average	
Borough	Citywide Share	Borough Share	Total Share	Plaintiffs' Values	Correct Values*
Brooklyn	.000000848	.000000448	.000001296	—20%	— 16.6%
Queens	.000000848	.000000528	.000001376	—13%	— 11.5%
Manhattan	.000000848	.0000007	.000001548	— 0.4%	— 0.4%
Bronx	.000000848	.000000855	.000001703	— 8.7%	+ 9.5%
Staten Island	.000000848	.000002839	.000003687	—57.8%	+137.1%

* Value also include correction of minor rounding errors in plaintiffs' "share" values.

Affidavit of Frank V. Ponterio in Opposition to Plaintiffs' Motion for Summary Judgment

6. A most telling demonstration of plaintiffs' utter failure to comprehend the crucial factual issue before this Court is found in the footnote on page 42 of plaintiffs' memorandum of law. Plaintiffs state in criticism of my methodology that, for the case of a combined vote of 2 city-wide members and the Staten Island borough president for the mayorless Board, 350,000 citizens dominate the remaining 6.75 million, whereas my methodlogy shows an over-representation of only 6.83%. It is obvious immediately, of course, that plaintiffs have simply ignored the concurrent representation of the two city-wide members. It seems hardly necessary to point out that the method for accounting for the overlay of city-wide and borough representation is the single underlying mathematical issue before this Court. It is absurd to address this issue by ignoring it. But the absurdity of plaintiffs' reasoning does not end there. In the 40-vote plan proposed by plaintiffs there would be 19 districts, each with a population of about 350,000 and one representative. Each city-wide member would have 7 votes. On the mayorless version of this Board, there would be a total of 33 votes. A coalition of two city-wide members (14 votes) plus three districts (3 votes) achieves a majority. By plaintiffs' reasoning, 1.05 million citizens would dominate the remaining 6.02 million, although deviations are essentially zero. Furthermore, if all boroughs had identical populations (1.41 million) and one representative, as in my hypothetical ideal Board, 2 city-wide members plus one borough representative would achieve a majority of the mayorless Board. Plaintiffs would conclude that 1.41 million citizens dominate the remaining 5.66 million, even though every methodology ever devised would show constitutionally perfect apportionment.

Affidavit of Frank V. Ponterio in Opposition to Plaintiffs' Motion for Summary Judgment

7. Plaintiffs' contention that my methodology overweights city-wide votes demonstrates their lack of understanding of my methodology and a confusion of representation with voting power. My methodology simply compares aggregate city-wide representation on the actual Board against a hypothetical perfect standard for each voting combination that enables the Board to act. The fact is that I do not weight "votes" at all, I weight representation. Should this Court decide that the appropriate quantity to be analyzed is voting power, my methodology could be applied with but a single modification. The modification consists simply of weighing each city-wide member by the total population of the City, multiplied by 2 (to account for his 2 votes), and divided by 5 (so that, in the aggregate, the 3 city-wide members' weight is $\frac{6}{5}$ x 7,071,303 and the 5 borough presidents' weight is 7,071,030, corresponding to the 6 to 5 ratio of total city-wide to total borough votes). Each borough president remains weighted by the population of his borough.

As with my inital methodology, every coalition which allows the Board to act is defined and for each such coalition the population-weighted city-wide and borough votes are summed to find weighted total votes. These weighted total votes are then compared with the corresponding weighted total votes which would result for the same coalition on the ideal Board, and the percent differences computed.

Affidavit of Frank V. Ponterio in Opposition to Plaintiffs' Motion for Summary Judgment

As presently constituted, the full Board can act by (at least) votes of the following members:

SIMPLE MAJORITY (6 VOTES)

Case I:	2 city-wide	+ 2 boroughs
Case II:	1 city-wide	+ 4 boroughs
Case III:	3 city-wide	+ no boroughs

TWO-THIRDS MAJORITY (8 VOTES)

Case IV:	2 city-wide	+ 4 boroughs
Case V:	3 city-wide	+ 2 boroughs

THREE-FOURTHS MAJORITY (9 VOTES)

Case VI:	2 city-wide	+ 5 boroughs
Case VII:	3 city-wide	+ 3 boroughs

UNANIMOUS (11 VOTES)

Case VIII:	3 city-wide	+ 5 boroughs

On budget override matters, the vote of the Mayor is not counted. Either a simple majority or a two-thirds majority may be required. These majorities can be achieved by (at least) votes of the following members:

SIMPLE MAJORITY (5 VOTES)

Case IX:	2 city-wide	+ 1 borough
Case X:	1 city-wide	+ 3 boroughs
Case XI:	no city-wide	+ 5 boroughs

TWO-THIRDS MAJORITY (6 VOTES)

Case XII:	2 city-wide	+ 2 boroughs
Case XIII:	1 city-wide	+ 4 boroughs

Affidavit of Frank V. Ponterio in Opposition to Plaintiffs' Motion for Summary Judgment

Exhibits 2 through 4 show every combination of votes (cases) of the full Board for simple majority, two-thirds majority, and three-fourths majority respectively. Also shown at the foot of each exhibit are averages of the percent differences for all cases, for all cases in which the associated majority is achieved, and for all threshold cases, i.e., cases in which the associated majority is just achieved. Exhibits 5 and 6 show respectively corresponding information for votes of the mayorless Board for simple majority and two-thirds majority votes. Tables 3, 4, 5, 6, and 7 present a summary of threshold cases from Exhibits 2 through 6.

Affidavit of Frank V. Ponterio in Opposition to Plaintiffs' Motion for Summary Judgment

TABLE 3

SIMPLE MAJORITY

Case	Boroughs Voting Yes	Weighted Borough Votes	Weighted Total Votes	% Difference From Norm
	Bn+Q	4122261	9779085	— 15.25
	Bn+M	3658469	9315293	— 9.78
	Bn+Bx	3400051	9056875	— 6.74
	Bn+S	2583057	8239881	+ 2.89
I	Q+M	3318858	8975682	— 5.78
	Q+Bx	3060440	8717264	— 2.73
	Q+S	2243446	7900270	+ 6.89
	M+Bx	2596648	8253472	+ 2.73
	M+S	1779654	7436478	+ 12.36
	Bx+S	1521236	7178060	+ 15.41
	Bn+Q+M+Bx	6718909	9547321	— 12.52
	Bn+Q+M+S	5901915	8730327	— 2.89
II	Bn+Q+Bx+S	5643497	8471909	+ 0.16
	Bn+M+Bx+S	5179705	8008117	+ 5.62
	Q+M+Bx+S	4840094	7668506	+ 9.63
III	None	0000000	8485236	0.00

Bn–Brooklyn; Q–Queens; M–Manhattan; Bx–Bronx; S–Staten Island

Norm weighted total votes = 8485236

Affidavit of Frank V. Ponterio in Opposition to Plaintiffs' Motion for Summary Judgment

TABLE 4

TWO-THIRDS MAJORITY

Case	Boroughs Voting Yes	Weighted Borough Votes	Weighted Total Votes	% Difference From Norm
	Bn+Q+M+Bx	6718909	12375733	— 9.39
	Bn+Q+M+S	5901915	11558739	— 2.17
IV	Bn+Q+Bx+S	5643497	11300321	+ 0.12
	Bn+M+Bx+S	5179705	10836529	+ 4.22
	Q+M+Bx+S	4840094	10496918	+ 7.22
	Bn+Q	4122261	12607497	— 11.44
	Bn+M	3658469	12143705	— 7.34
	Bn+Bx	3400051	11885287	— 5.05
	Bn+S	2583057	11068293	+ 2.17
V	Q+M	3318858	11804094	— 4.33
	Q+Bx	3060440	11545676	— 2.05
	Q+S	2243446	10728682	+ 5.17
	M+Bx	2596648	11081884	+ 2.05
	M+S	1779654	10264890	+ 9.27
	Bx+S	1521236	10006472	+ 11.55

Bn–Brooklyn; Q–Queens; M–Manhattan; Bx–Bronx; S–Staten Island

Norm weighted total votes = 11313648

Affidavit of Frank V. Ponterio in Opposition to Plaintiffs' Motion for Summary Judgment

TABLE 5

THREE-FOURTHS MAJORITY

Case	Boroughs Voting Yes	Weighted Borough Votes	Weighted Total Votes	% Difference From Norm
VI	Bn+Q+M+Bx +S	7071030	12727854	0.00
	Bn+Q+M	5549794	14035030	— 10.27
	Bn+Q+Bx	5291376	13776612	— 8.24
	Bn+Q+S	4474382	12959618	— 1.82
	Bn+M+Bx	4827584	13312820	— 4.60
VII	Bn+M+Bx	4010590	12495826	+ 1.82
	Bn+Bx+S	3752172	12237408	+ 3.85
	Q+M+Bx	4487973	12973209	— 1.93
	Q+M+S	3670979	12156215	+ 4.49
	Q+Bx+S	3412561	11897797	+ 6.52
	M+Bx+S	2948769	11434005	+ 10.17

Bn–Brooklyn; Q–Queens; M–Manhattan; Bx–Bronx; S–Staten Island

Norm weighted total votes = 12727854

Affidavit of Frank V. Ponterio in Opposition to Plaintiffs' Motion for Summary Judgment

TABLE 6

SIMPLE MAJORITY—MAYORLESS BOARD

Case	Boroughs Voting Yes	Weighted Borough Votes	Weighted Total Votes	% Difference From Norm
IX	Bn	2230936	7887760	— 11.55
	Q	1891325	7548149	— 6.75
	M	1427533	7084357	— 0.19
	Bx	1169115	6825939	+ 3.47
	S	352121	6008945	+ 15.02
X	Bn+Q+M	5549794	8378206	— 18.49
	Bn+Q+Bx	5291376	8119788	— 14.83
	Bn+Q+S	4474382	7302794	— 3.28
	Bn+M+Bx	4827584	7655996	— 8.27
	Bn+M+S	4010590	6839002	+ 3.28
	Bn+Bx+S	3752172	6580584	+ 6.94
	Q+M+Bx	4487973	7316385	— 3.43
	Q+M+S	3670979	6499391	+ 8.08
	Q+Bx+S	3412561	6240973	+ 11.74
	M+Bx+S	2948769	5777181	+ 18.30
XI	Bn+Q+M+Bx +S	7071030	7071030	0.00

Bn–Brooklyn; Q–Queens; M–Manhattan; Bx–Bronx; S–Staten Island

Norm weighted total votes = 7071030

Affidavit of Frank V. Ponterio in Opposition to Plaintiffs' Motion for Summary Judgment

TABLE 7

TWO-THIRDS MAJORITY—MAYORLESS BOARD

Case	Boroughs Voting Yes	Weighted Borough Votes	Weighted Total Votes	% Difference From Norm
	Bn+Q	4122261	9779085	—15.25
	Bn+M	3658469	9315293	— 9.78
	Bn+Bx	3400051	9056875	— 6.74
	Bn+S	2583057	8239881	+ 2.89
	Q+M	3318858	8975682	— 5.78
	Q+Bx	3060440	8717264	— 2.73
	Q+S	2243446	7900270	+ 6.89
	M+Bx	2596648	8253472	+ 2.73
	M+S	1779654	7436478	+ 12.36
	Bx+S	1521236	7178060	+ 15.41
	Bn+Q+M+Bx	6718909	9547321	—12.52
	Bn+Q+M+S	5901915	8730327	— 2.89
	Bn+Q+Bx+S	5643497	8471909	+ 0.16
	Bn+M+Bx+S	5179705	8008117	+ 5.62
	Q+M+Bx+S	4840094	7668506	+ 9.63

Bn–Brooklyn; Q–Queens; M–Manhattan; Bx–Bronx; S–Staten Island

Norm weighted total votes = 8485236

Affidavit of Frank V. Ponterio in Opposition to Plaintiffs' Motion for Summary Judgment

Table 8 summarizes both average and maximum percent differences. As expected, the percent differences are higher than with my initial methodology. Nevertheless, average differences are still small and maximum differences are far less than those claimed in plaintiffs' analyses, again illustrating the ameliorating effect of dominant city-wide representation.

TABLE 8

		Average % Differences			Maximum % Differences (All Achieved Cases)	
	Majority Required	Threshold Cases	All Achieved Cases	All Cases	Over Represented	Under Represented
Full Board	1/2	7.26	6.01	9.19	+15.41	—15.25
	2/3	5.19	4.59	9.19	+11.55	—11.44
	3/4	4.13	3.80	9.19	+10.17	—10.27
Mayorless Board	1/2	8.86	7.26	5.72	+18.30	—18.49
	2/3	7.11	6.17	5.72	+15.41	—15.25

All percent deviations are within about ±15% for the full Board and about ±18% for the mayorless Board. For the vast majority of cases, the percent differences are within much smaller limits, as shown in Table 9.

TABLE 9

	Majority Required	Number of Achieved Cases	Differences within ±10%		Differences within ±12%	
			Number	%	Number	%
Full Board	1/2	128	102	79.7	110	85.9
	2/3	44	40	90.9	44	100
	3/4	19	17	89.5	19	100
Mayorless Board	1/2	64	46	71.9	50	78.1
	2/3	38	30	78.9	31	81.6
Totals		293	235	80.2	254	86.7

8. The validity of my methodology may perhaps be more clearly appreciated by examining it from an alternative perspective. Instead of hypothesizing a Board for use as a standard which has Boroughs with equal populations and equal votes, I can define a Board with populations as they actually exist and borough votes weighted exactly proportioned to those populations. Thus defined, this standard Board would consist of three city-wide members, each with two votes and five borough presidents with votes weighted as follows:

Brooklyn	—	1.5775184
Queens	—	1.3373759
Manhatan	—	1.0094237
Bronx	—	0.82669357
Staten Island	—	0.24898848
Total	—	5

The borough weighted votes are obtained by multiplying the ratios of borough to city population by 5 (e.g., for Brooklyn, $2{,}230{,}936 \div 7{,}071{,}030 \times 5 = 1.5775184$ votes). It should be noted that every analysis method proposed by plaintiffs would indicate perfect apportionment for such a Board, and the ratio of total city-wide to total borough votes remains at 6:5 as with the actual Board. Total city-wide + borough votes for this standard Board, for each coalition enabling the Board to act (as defined in Tables 3 through 7) are compared with the corresponding total votes on the actual Board. I then compute percent differences. This methodology is mathematically identical to the methodology described in paragraph 7 and yields precisely the same results. Table 10 shows the results for

a simple majority of the full Board. By comparing this table with Table 3, the equivalence of the two methodologies is evident (mathematically this may be seen by observing that weighted votes entries in Table 3 are all equal to the corresponding entries in Table 10 multiplied by 1,414,206, the population of my ideal borough). This alternative perspective shows my methodology to be equivalent to the initial method described by plaintiffs in their Complaint, except that I avoid any arbitrary allocation of city-wide votes among the boroughs by analyzing city-wide rather than borough totals.* It is this avoidance of both city-wide vote allocation and subsequent focusing on borough rather than city-wide totals which is the key to a proper evaluation of the overlay of city-wide and borough representation. (Plaintiffs are fond of saying that I concentrate on boroughs. Of course, exactly the reverse is true. I analyze only city-wide totals while plaintiffs analyze only borough totals). Logic and common sense dictate that if the overlay of city-wide and borough representation is to be analyzed, the methodology for doing so must preserve, not chop up, that overlay.

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* And, unlike plaintiffs, I compute percents correctly.

Affidavit of Frank V. Ponterio in Opposition to Plaintiffs' Motion for Summary Judgment

TABLE 10

SIMPLE MAJORITY

Case	Boroughs Voting Yes	Weighted Borough Votes	Weighted Total Votes	% Difference From Norm
	Bn+Q	2.9148943	6.9148943	—15.25
	Bn+M	2.5869421	6.5869421	— 9.78
	Bn+Bx	2.404212	6.404212	— 6.74
	Bn+S	1.8265069	5.8265069	+ 2.89
I	Q+M	2.3467996	6.3467996	— 5.78
	Q+Bx	2.1640695	6.1640695	— 2.73
	Q+S	1.5863644	5.5863644	+ 6.89
	M+Bx	1.8361173	5.8361173	+ 2.73
	M+S	1.2584122	5.2584122	+12.36
	Bx+S	1.0756821	5.0756821	+15.41
	Bn+Q+M+Bx	4.7510115	6.7510115	—12.52
	Bn+Q+M+S	4.1733064	6.1733064	— 2.89
II	Bn+Q+Bx+S	3.9905763	5.9905763	+ 0.16
	Bn+M+Bx+S	3.6626241	5.6626241	+ 5.62
	Q+M+Bx+S	3.4224816	5.4224816	+ 9.63
III	none	0	0	0.00

Norm = 6 votes

Affidavit of Frank V. Ponterio in Opposition to Plaintiffs' Motion for Summary Judgment

This alternative perspective also demonstrates that my methodology is overly conservative in its quantification of voting power percent differences. It can easily be seen that with the exact weighted borough votes defined above, no one borough has two or more votes, no combination of two boroughs has three or more votes, and no combination of three boroughs has four or more votes. This means that none of the voting coalitions enabling the Board to act which are indicated as underrepresented (negative % differences) would be affected even if borough votes were exactly weighted according to borough populations. For example in Case I coalitions, even the most populous borough, Brooklyn, could not alone achieve a majority vote in combination with the votes of two city-wide members. This signifies that for all coalitions which are shown as underrepresented, the underrepresentation is more apparent than real. From a voting power perspective, all underrepresented cases should be treated as having zero percent differences. "Real" voting power malapportionment is limited to overrepresented cases. For example, with one vote each, Bronx and Staten Island could form an effective coalition in Case I. With population-weighted votes, they could not (total vote would be 5.0756821 vice 6 votes required). In terms of real voting power, the spreads between most overrepresented and most underrepresented cases are about halved. This results in spreads essentially the same as (actually somewhat less than) those computed for my initial methodology based on representation as the measure of apportionment. Perhaps better than any other, this analysis approach demonstrates the blending of majority control and minority representation

Affidavit of Frank V. Ponterio in Opposition to Plaintiffs' Motion for Summary Judgment

that the Court of Appeals recognized as a legitimate objective.

/s/ Frank V. Ponterio
Frank V. Ponterio
766 Pelton Avenue
Staten Island, N.Y. 10310
(212) 981-7953

Dated: January 24, 1984
Staten Island, N.Y.

Sworn to before me this 24th day of January, 1984

/s/ Mary T. Brosnan
Notary Public

Plaintiffs' Statement of Facts Pursuant to Local Rule 3(g), filed June 7, 1984

UNITED STATES DISTRICT COURT

Eastern District of New York

81-CV-3920 (E.R.N.)

Morris, et al.,

Plaintiffs,

—against—

The Board of Estimate, et al.,

Defendants,

—and—

Ponterio, et al.,

Intervenors.

The following is a statement of the facts which plaintiffs believe to be undisputed, which entitle plaintiffs to summary judgment:

1. Plaintiffs are residents and registered voters in Brooklyn, New York.

2. The Board of Estimate is a body of New York City municipal government authorized by Chapter 3 of the New York City Charter. The Board of Estimate is comprised of the Mayor, City Council President, Comptroller and the five borough presidents of the City of New York.

3. The City of New York is the local municipal entity which is governed, in part, by the defendant Board of Estimate.

4. Edward I. Koch, Carol Bellamy and Harrison J. Goldin are respectively Mayor, City Council President and Comptroller of the City of New York. These elected officials hold citywide offices and each of these officials was elected to his/her office in the last citywide election. Under the New York City Charter each of these office holders is entitled to two votes out of the total of eleven votes allocated to the membership of the Board of Estimate.

5. Howard Golden, Borough President of Kings County; Andrew Stein, Borough President of New York County; Stanley Simon, Borough President of Bronx County; Donald Manes, Borough President of Queens County; and Anthony Gaeta, Borough President of Richmond County, are the five borough presidents of the boroughs of the City of New York. Each of these officials was elected by voters in each of their respective boroughs in the last countywide elections. Under the New York City Charter, each of the borough presidents is entitled to one vote out of the total of eleven votes which are allocated to the members of the Board of Estimate.

6. The Board of Estimate is comprised of the three defendant citywide officials whom the City Charter grants two votes each, and the five defendant borough presidents who are granted one vote each.

7. The Board of Estimate of the City of New York is a governmental body which is authorized by the New York City Charter, to exercise certain governmental powers which include but are not limited to the following:

A. The Board of Estimate exclusively

i. determines the use, development and improvement of property owned by the City;

ii. approves standards, scopes and final designs of capitol projects for the City;

iii. negotiates and enters into all contracts on behalf of the City;

iv. negotiates and approves all franchises that are granted by the City;

v. grants leases of City property and enters into leases of property for City use;

vi. sets the rates for purchases of water from the City;

vii. sets the charges for sewer services provided by the City; and

viii. approves or modifies all zoning decisions for the City;

ix. sets tax abatements.

B. The Board of Estimate acting in conjunction with the New York City Council

i. recommends and approves the expense budget of the City without the participation of the Mayor;

iii. periodically modifies the budgets of the City;

iv. confers with the City Council when agreement on the budget between the two bodies is not reached;

v. overrides mayor vetoes of budget items without the participation of the Mayor; and

vi. holds hearings on budgetary matters.

C. The Board of Estimate also

i. administers the Bureau of Franchises;

ii. administers the Bureau of the Secretary;

iii. holds public hearings on any matter of City policy within its responsibilities whenever called upon to do so by the Mayor or in its discretion for the public interest;

iv. holds hearings on tax abatements that are within the discretion of City administrative agencies; and

v. makes recommendations to the Mayor or City Council in regard to any matter of City policy.*

8. The Board of Estimate is the only municipal body in New York City government which requires New York City's Mayor, Comptroller, City Council President and Borough Presidents to meet regularly and vote together upon issues which concern the governing of New York City.

9. The Board of Estimate's powers, functions and official activities constitute the exercise of general governmental powers.

10. The Board of Estimate's activities affect the geographic areas coexistensive with New York City.

11. The population of the City of New York is 7,071,030.

---

* For a complete list of the Board of Estimate's powers with reference to Charter and Administrative Code provisions, see Appendix A to Exhibit A (the Kramarsky Study) which is hereby incorporated herein by reference.

12. The population of each borough of the City of New York is as follows:

Brooklyn	2,230,936
Queens	1,891,325
Manhattan	1,427,533
Bronx	1,169,115
Staten Island	532,121

13. Measuring deviations from a norm of representation by separating the representation of the borough presidents from representation of the citywide Board representatives, the deviations by borough are as follows:

Borough	*Population*	*Deviation from the Average*
Brooklyn	2,230,936	—57.7%
Queens	1,891,325	—33.7%
Manhattan	1,427,533	— 0.9%
Bronx	1,169,115	+17.4%
Staten Island	532,121	+75.2%

The extreme deviation is ±132.9%.

14. Cumulating representation by the borough and citywide Board representatives, the deviations from the norm population per vote inherent in the present representation scheme on the Board of Estimate are as follows:

Brooklyn	—20.1%
Queens	—13.2%
Manhattan	— .5%
Bronx	+ 8.6%
Staten Island	+57.9%

The extreme deviation from a norm of representation on the Board of Estimate is +78%.

Statement of Facts Pursuant to Local Rule 3(g)

15. The measure of the citizens' share by borough in their borough president is as follows:

Borough	*Population*	*Share*	*Deviation from Average*
Brooklyn	2,230,936	.000000448	—57.7%
Queens	1,891,325	.000000528	—33.7%
Manhattan	1,427,533	.0000007	— 0.9%
Bronx	1,169,115	.000000855	+17.4%
Staten Island	532,121	.000002839	+75.2%

The extreme deviation if ±132.9%

16. The measure of the citizens' share by borough in their cumulative representation on the Board of Estimate is as follows:

Borough	*Citywide Share*	*Borough Share*	*Total Share*	*Deviation from Average*
Brooklyn	.000000848	.000000448	.000001296	—20%
Queens	.000000848	.000000528	.000001376	—13%
Manhattan	.000000848	.0000007	.000001548	— 0.4%
Bronx	.000000848	.000000855	.000001703	+ 8.7%
Staten Island	.000000848	.000002839	.000003687	+57.8%

The extreme deviation is ±78%.

17. New York City's population includes many and diverse racial and ethnic groups:

White	61%
Black	25%
Asian & Other	14%
Hispanic	20%

18. United States' census data show the following breakdown by borough:

Statement of Facts Pursuant to Local Rule 3(g)

	Brooklyn	*Queens*	*Manhattan*	*Bronx*	*Staten Island*
White	56%	71%	59%	47%	89%
Black	42%	19%	22%	32%	7%
Asian & Others	12%	10%	19%	21%	4%
Hispanic	18%	14%	24%	34%	5%

18. The boroughs of Bronx, Queens, Brooklyn, and Manhattan each contain numerous identifiable demographically homogenous neighborhoods. Within each borough there exist neighborhoods which are each demographically dissimilar to one another.

19. There have been five members of racial minority groups who sat on the Board of Estimate.

20. The primary duty of the borough president is to sit on the Board of Estimate. The borough presidents' powers and duties are included in Chapter 4 of the City Charter.

21. Under the present system of representation mandated by sections 61, 62, 120 and 222 of the New York City Charter for the Board of Estimate, representatives of 41.7% of the population of the City of New York can control a majority of votes on every budget measure.

Respectfully submitted,

/s/ Richard Emery
Richard Emery
Arthur Eisenberg
Attorneys for Plaintiffs
New York Civil Liberties Union
84 Fifth Avenue
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Dated:

Plaintiffs' Joint Statement on Issues to Be Decided, filed June 7, 1984

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81-CV-3920 (E.R.N.)

MORRIS, et al.,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE, et al.,

Defendants,

—and—

PONTERIO, et al.,

Intervenors.

The Second Circuit Court of Appeals remanded this case, directing this Court 1) to decide upon a methodology for analyzing the apportionment of the Board; 2) to determine the degree of malapportionment, if malapportionment exists; and to rule on the policies and interests which the Supreme Court has held may justify deviations from the literal one person, one vote formula.

In accordance with that directive the undersigned parties agree that the issues presented to this Court should be bifurcated. At this juncture we believe that the Court need only decide the first and second questions posed by the Second Circuit; namely, the appropriate method for measuring apportionment and the degree of malapportionment if that exists. In this regard the following issues must be resolved:

Joint Statement on Issues to Be Decided

1. Whether, as plaintiffs contend, the Board of Estimate is malapportioned under either the *Abate* test, or an analysis of the individual citizen's share of representation or as a result of the equal votes of the respective borough presidents in light of the variations in population between the five boroughs;

2. Whether, as City defendants contend, the presence and votes of the three city-wide members on the Board renders it incapable of analysis under the traditional quantitative approaches suggested by plaintiffs and whether a qualitative approach is appropriate;

3. Whether one or both of the mathematical methods proposed by intervenor-defendant Ponterio demonstrate that percent departures from strict per capita apportionment comply with constitutional one person, one vote requirements;

4. Whether, as intervenor-defendant Straniere contends, intervenor-defendant Ponterio's analysis is appropriate.

The undersigned agree that the above questions are issues of law which can be resolved without an evidentiary hearing.

In the event that the Court adopts the City defendants' qualitative approach to analyzing the Board's structure, plaintiffs believe an evidentiary hearing is required on the issue of whether local community interests are prejudiced by the Board's present representational scheme.

In suggesting a judicial inquiry into the issues recited above the parties recognize that a second set of issues may need to be resolved if, at the close of the initial inquiry, the Court concludes that malapportionment exists under

any of the above-identified analytical models. If the Court finds apportionment it must then inquire into any legally acceptable justification for the degree of deviation found to exist in the composition of the Board of Estimates. We agree, however, that the Court should conduct an inquiry into the methodological and apportionment issues before reaching these secondary issues regarding justifications.

/s/ Richard Emery
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By: /s/
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Intervenor

Robert Straniere
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Intervenor

Joint Stipulation of Policies and Interests Served by the Board of Estimate, dated October 18, 1984

UNITED STATES DISTRICT COURT

Eastern District of New York

81 Civ. 3920 (ERN)

Beverly Morris; Joy Clarke Holmes; Joanne Oplustil,

Plaintiffs,

—against—

The Board of Estimate, The City of New York, Edward I. Koch, individually and as Mayor of New York, Carol Bellamy, individually and as City Council President, Harrison J. Goldin, individually and as Comptroller for the City of New York, Howard Golden, Andrew Stein, Stanley Simon, Donald Manes, Anthony Gaeta, each individually and as Borough Presidents of the boroughs of the City of New York,

Defendants,

—and—

Frank V. Ponterio,

Intervenor-Defendant,

Robert A. Straniere, individually and as a member of the New York State Assembly,

Intervenor-Defendant.

Pursuant to this Court's order dated August 21, 1984, the parties hereto submit to the Court this joint stipulation for submission listing:

Joint Stipulation of Policies and Interests

1. those *agreed* valid policies and interests presently served by the Board; and
2. those *disputed* policies and interests which at least one defendant maintains are valid and are presently served by the Board.

Policies and interests asserted by one or more defendants follow paragraph numbers. After each such policy, plaintiffs' response is set forth.

1. *Defendants' asserted interest:*

Absence of any demonstrable injury to the populations of the more heavily populated boroughs as a consequence of requiring equal votes among the boroughs, particularly in light of the presence on the Board of three members—the Mayor, the Comptroller and the City Council President—who are elected by all the voters in all the boroughs, who each have two votes, and who in the aggregate outvote the five borough presidents.

Plaintiffs' response:

Plaintiffs cannot agree. Based on findings of this Court in its August 24, 1984, opinion determining ± 133% voting dilution, direct prejudice to individual voters of the larger boroughs under applicable Supreme Court precedent is plain. Further, if necessary, it can be demonstrated that the smaller boroughs have benefitted unduly as a result of equal voting power with the larger boroughs. Finally, as this Court concluded, the presence of the citywide officials on the Board does not mitigate the voting strength dilution inherent in the present Board structure.

Joint Stipulation of Policies and Interests

2. *Defendants' asserted interest:*

Uniqueness of the Board as a form of local government because of its composition and voting allocation.

Plaintiffs' response:

Plaintiffs are unable to agree with this proposition because we do not understand what defendants' mean by "uniqueness" and we are, therefore, uncertain as to how defendants claim that the "uniqueness" of the Board advances any governmental interest. Plaintiffs note that many other cities have "unique" governing institutions which conform with one person, one vote structures and serve similar functions as the Board of Estimate.

3. *Defendants' asserted interest:*

Meaningful representation of the citizens of the lesser populated boroughs, especially Staten Island, in Board affairs.

Plaintiffs' response:

Plaintiffs are again unable to agree with this proposition because we do not understand what defendants mean by "meaningful representation." Plaintiffs agree that our system of representative democracy is well served when governmental institutions are structured to provide "meaningful representation" of the will of the people. Plaintiffs have consistently contended that the present structure of the Board of Estimate provides for "meaningful representation" only for the citizens of Staten Island. Considerably more "meaningful representation" by any definition could be far more effectively accomplished by a Board recon-

stituted in a form which complied with one person, one vote strictures.

4. *Defendants' asserted interest:*

Preservation of the boroughs as legitimate representational entities in local government.

Plaintiffs' response:

Plaintiffs agree, except for the word "legitimate." It is plaintiffs' contention that the borough as an entity is a historical anomaly from which virtually all power has eroded and that in so far as its continued existence as a governmental entity precludes representation consistent with one person, one vote structures, it does not constitute a legitimate reason for diluting voting power.

5. *Defendants' asserted interest:*

Use of natural and historical borough boundaries to define representational entities in local government.

Plaintiffs' response:

Plaintiffs agree to the extent that the present scheme does look to historical borough boundaries and perhaps even natural boundaries.* It is also plaintiffs' position that alternative representational schemes could both preserve natural and historical borough boundaries and comply with one person, one vote.

---

* We are uncertain as to whether the dividing line between Brooklyn and Queens rests upon a natural boundary or whether the division is purely a function of historical development.

6. *Defendants' asserted interest:*

Historical treatment of the boroughs as separate governmental entities.

Plaintiffs' response:

This proposition seems no different from the proposition advanced in the preceding paragraph. As to both propositions 5 and 6 as advanced by the defendants, we urge that the historical role of the borough as primary governmental authority in the City has long since passed. Any remaining role of the borough governments can be adequately accommodated in a reconstituted Board which complies with one person, one vote.

7. *Defendants' asserted interest:*

Necessity of retaining borough representation on the Board in light of abolition of such representation on the City Council.

Plaintiffs' response:

Plaintiffs dispute that claim. Local interests are well represented by the present structure of the City Council. The City Council's structure as a result of this Court's ruling only demonstrates the primacy of one person, one vote interests over borough interests. To the extent that borough interests remain important, a reconstituted Board structure which complies with one person, one vote can accommodate such interests.

8. *Defendants' asserted interests:*

Effectiveness of a Board comprised of only eight members.

Plaintiffs' response:

Plaintiffs are unable to agree with this proposition because, again, we do not know what it means. We are unsure as to whether in using the word "effectiveness," defendants mean to use the word "efficiency." And if so, we do not know whether defendants mean, by this proposition, to contend that a board is more efficient with eight members than it would be with eighteen or than it would be with five. It is not clear to us whether defendants are contending that eight is the ideal number from the standpoint of efficiency or effectiveness. Plaintiffs do concede that the Board as presently constituted efficiently and effectively overrepresents the small boroughs and underrepresents the large boroughs. A Board reconstituted to comply with one person, one vote could be far more effective to represent fairly all the people of the City.

9. *Defendants' asserted interest:*

The long-standing dual role of borough representatives as both Borough President and the member of the Board.

Plaintiffs' response:

This proposition by the defendants seems to be merely a restatement of the contention asserted in paragraphs five and six above. So understood, our response to it remains the same as that which we presented above. Essentially that is that the borough presidents only remaining power of any significance is their role as Board of Estimate representative. A Board reconstituted in compliance with one person, one vote could just as well accommodate the dual role of borough presidents, to the extent that such a role remains.

10. *Defendants' asserted interest:*

Coordination of City and borough governmental authority and responsibility.

Plaintiffs' response:

Plaintiffs cannot agree with this statement as there is virtually no remaining significant borough government authority. Moreover, a Board reconstituted consistent with one person, one vote rules could accommodate coordination of the few remaining borough government powers with centralized City authority.

11. *Defendants' asserted interest:*

Ability to balance differing interests and needs, and to accommodate development and long-term planning requirements of both the boroughs and the City as a whole.

Plaintiffs' response:

Plaintiffs agree, however, a Board reconstituted to comply with one person, one vote structures could far better serve this function as it would more accurately reflect the interests of the people of the City.

12. *Defendants' asserted interest:*

Flexibility to meet changing societal needs, particularly in a large municipality whose local government is complex.

Plaintiffs' response:

It is difficult to agree with this proposition as it is so undefined and ambiguous. It is clear, however, that a

Board reconstituted to comply with one person, one vote structures could far better serve this function as it would more accurately reflect the interests of the people of the City.

13. *Defendants' asserted interest:*

Correlation between the functions of the Board and the impact of those functions upon the boroughs, particularly in regard to the formulation of the capital budget, in order to assure that different parts of the City get their fair share of service contracts and capital budget allocation which might otherwise go to those portions of the City contributing the most tax dollars.

Plaintiffs' response:

Plaintiffs agree, however, we note that under the present Board structure the smaller boroughs obtain more than their allotted share by population, and that a Board reconstituted to comply with one person, one vote structures could far better serve this function as it would more accurately reflect all the people's interests.

14. *Defendants' asserted interest:*

Necessity and effectiveness of borough representation in local government as an intermediate size entity, with citywide representation being larger and community board representation being smaller.

Plaintiffs' response:

Plaintiffs dispute this proposition. No such interest is anywhere found in the City Charter or City history. Local interests must be represented, however, "borough interests" and local interests are rarely, if ever, synonymous. Most often "borough interests" cannot be identified because borough interests are comprised by many conflicting local interests within each borough. Therefore, the identification of something called "borough interests" as intermediate to citywide and local interests is impossible and not a plausible justification for maintaining the present structure of the Board.

15. *Defendants' asserted interest:*

Ability of the Board as presently constituted to eliminate undue concentration of executive power and to supplement the City Council, which retains the general legislative power of the City.

Plaintiffs' response:

Plaintiffs agree, however, there is no reason why a Board of Estimate that is balanced from the standpoint of one person, one vote is necessary to achieve this interest.

Statement of Plaintiffs:

None of the interests advanced by defendants, even if such interests were genuine, could justify deviations of $\pm$ 133%. No interest can support dilution of an individual voter's right to exercise an equally weighted vote at this degree of disparity of voting power. It is exactly for this reason that the Supreme Court has refrained from entering the "political thicket." Identification of such interests as those described above is ambiguous and inexact. Moreover, such interests are irrelevant to the basic value of the right of an individual voter to be assured of a vote

equal in strength to his neighbor. Finally, there is no interest asserted above which cannot be equally well served by a Board reconstituted to conform with one person, one vote requirements.

Dated: New York, New York
October 18, 1984

/s/

Richard D. Emery
Arthur Eisenberg
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011
(212) 924-7800

Counsel for Plaintiffs

/s/

Susan Rosenberg on behalf of
F.A.O. Schwartz
Corporation Counsel
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Counsel for Defendants

Letter from Frank V. Ponterio to Edward R. Neaher, District Judge, dated October 22, 1984

FRANK V. PONTERIO
Attorney at Law
766 Pelton Avenue
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October 22, 1984

Hon. Edward R. Neaher
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Morris v. Board of Estimate
81 Civ. 3920

Dear Judge Neaher:

Pursuant to your August 21, 1984 order, I submitted to the Corporation Counsel for the City of New York, by letter dated September 24, 1984, a list of ten policies and interests I claim are presently served by the Board of Estimate. These ten policies and interests were included in a proposed joint stipulation prepared by the Corporation Counsel as coordinator for defendants and submitted for my concurrence. I communicated by telephone my concurrence with the proposed stipulation, as submitted, to Susan Rosenberg, assistant Corporation Counsel.

Without notice, prior consultation, or agreement, the Corporation Counsel subsequently revised the proposed stipulation before submitting it for response to Richard Emery, counsel for plaintiffs. The revision includes deletion of two policies and interests proposed by me and a

change in wording of another. Both the deletions and the wording change seriously prejudice arguments I intend to make to this Court and possibly on appeal of this case. Moreover, neither I nor intervenor-defendant Straniere were offered an opportunity to review and sign the completed joint stipulation filed with this Court on October 19, 1984.

I respectfully request that I be permitted to submit a supplement to the already filed joint stipulation restoring the two deleted items and the original wording of the third item. A copy of my proposed supplement is enclosed. I have, by copy of this letter, forwarded this supplement to counsel for all parties. I believe that no party will be prejudiced even if submission of the proposed supplement with plaintiffs' response delays these proceedings by a few more days.

Respectfully yours,

/s/ Frank V. Ponterio
Frank V. Ponterio, pro se
Intervenor-defendant

cc: Richard Emery, Esq.
F. A. O. Schwarz, Esq.
Susan Rosenberg, Esq.
Hon. Robert Straniere

So Ordered:

/s/ Edward R. Neaher
Edward R. Neaher
U.S. District Judge

Dated: 10-29-84

Order of Edward R. Neaher, District Judge, dated October 29, 1984

UNITED STATES DISTRICT COURT

Eastern District of New York

81 Civ. 3920 (ERN)

Beverly Morris, Joy Clarke Holmes, Joanne Oplustil,

Plaintiffs,

v.

The Board of Estimate, The City of New York, Edward I. Koch, individually as a Mayor of New York, Carol Bellamy, Individually and as City Council President, Harrison J. Goldin, Individually and as Comptroller for the City of New York, Howard Golden, Andrew Stein, Stanley Simon, Donald Manes, Anthony Gaeta, each individually and as Borough Presidents of the City of New York,

Defendants.

—and—

Frank V. Ponterio,

Intervenor-Defendant,

Robert A. Strainiere, individually and as a member of the New York State Assembly,

Intervenor-Defendant.

Pursuant to this Court's order dated August 21, 1984, the parties hereto submit to the Court this supplemental joint stipulation for submission listing:

Order of Edward R. Neaher, District Judge

1. those *agreed* valid policies and interests presently served by the Board; and
2. those *disputed* policies and interests which at least one defendant maintains are valid and are presently served by the Board.

AGREED VALID POLICIES AND INTERESTS PRESENTLY SERVED BY THE BOARD

16. Effectuation of delegated police-power responsibilities.*
17. Equality of voting power on the Board among the boroughs, as boroughs.*
18. Meaningful participation by the citizens of the lesser populated boroughs, especially Staten Island, in Board affairs.**

* Omitted from Joint Stipulation dated October 18, 1984.

** Added to restore intended wording of paragraph numbered 3 of Joint Stipulation dated October 18, 1984.

Plaintiffs' Supplemental Joint Stipulation of Policies and Interests Served by the Board of Estimate, dated January 9, 1985

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81 Civ. 3920 (ERN)

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, CAROL BELLAMY, individually and as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York; HOWARD GOLDEN, ANDREW STEIN, STANLEY SIMON, DONALD MANES, ANTHONY GAETA, each individually and as Borough Presidents of the boroughs of the City of New York,

Defendants,

—and—

FRANK, V. PONTERIO,

Intervenor-Defendant,

ROBERT A. STRAINIERE, individually and as a member of the New York State Assembly,

Intervenor-Defendant.

Pursuant to this Court's order dated August 21, 1984, the parties hereto submit to the Court this supplemental joint stipulation for submission listing:

1. those *agreed* valid policies and interests presently served by the Board; and
2. Those *disputed* policies and interests which at least one defendant maintains are valid and are presently served by the Board.

Policies and interests asserted by one or more defendants follow paragraph numbers after each such policy plaintiffs' response is set forth:

Defendants' asserted interest

16. Effectuation of delegated police-power responsibilities.

Plaintiffs' response:

Police power responsibilities under the New York City Charter inhere in the City Council. Notwithstanding this fact, all exercise of power by the Board of Estimate may be handled as effectively and more fairly under a Board structured consistent with one person, one vote; for example, by a Board with weighted votes alloted to the borough presidents according to the relative populations of each borough or under a Banzhaf weighted voting scheme.

Defendants' asserted interest:

17. Equality of voting power on the Board among the boroughs as boroughs.

Plaintiffs' response:

It would seem that defendants' asserted interest is subsumed by the interests asserted by defendants previously

in statements 3, 4, 5, 6, 7, 13, and 14. Equality of voting between the borough presidents in and of itself without respect to any other value or interest or without respect to population differentials does not constitute a legally cognizable reason for deviating from strict one person, one vote dictates. One could just as easily assert that no reason need be provided for state legislative districts varying in size by ± 133% other than that they follow historical boundaries. Plaintiffs' entire case rests on the rejection of such an assertion.

Defendants' asserted interest:

18. Meaningful participation by the citizens of the lesser populated boroughs, especially Staten Island, in Board affairs.

Plaintiffs' response:

As with plaintiffs' response to asserted interest number 3, the change in wording from "representation" to "participation" does not alter the lack of clarity in this asserted interest. Restructing the system of "participation" in Board affairs to comply with one person, one vote doctrine, would not only guarantee Staten Island and the lesser populated boroughs a fair vote but it would also provide a fair voice for the citizens of Brooklyn and Queens. As the Board is presently structured, the voice of the citizens in the larger boroughs is diluted by their lack of equality with the far fewer citizens of Staten Island who each have six times the influence over their representative as compared to the citizens of Brooklyn. Even a restructured Board with a weighted voting scheme under a Banzhaf analysis, as is used in most County legislative bodies in New York, would more adequately address the disparities

extant in the present scheme which takes no account of population differences.

This supplemental stipulation is submitted in addition to the stipulation of October 18, 1984, and should in all respects be considered therewith.

Dated: January 9, 1985
New York, New York

/s/ Susan Rosenberg
Susan Rosenberg, Esq.
On Behalf of
F.A.O. Schwarz
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/s/ Robert Straniere
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Intervenor-defendant *pro se*

Stipulation and Order of Edward R. Neaher, Distrct Judge, dated February 13, 1985

UNITED STATES DISTRICT COURT

Eastern District of New York

81 Civ. 3920 (ERN)

Beverly Morris, Joy Clarke Holmes, Jeanne Oplustil,

Plaintiffs,

v.

The Board of Estimate, The City of New York, Edward I. Koch, individually and as Mayor of New York, Carol Bellamy, Individually and as City Council President, Harrison J. Goldin, Individually and as Comptroller for the City of New York, Howard Golden, Andrew Stein, Stanley Simon, Donald Manes, Anthony Gaeta, each individually and as Borough Presidents of the City of New York,

Defendants.

Whereas, plaintiffs commenced this action on December 2, 1981, seeking *inter alia,* a judgment declaring unconstitutional as a violation of the one person, one vote doctrine the voting structure of the New York City Board of Estimate; and

Whereas, on January 14, 1982, defendants served and filed their answer to the complaint; and

Whereas, the Court granted without opposition the motions to intervene as defendants Frank V. Ponterio and

Stipulation and Order of Hon. Edward R. Neaher

Robert A. Straniere, respectivelly and the Court granted without opposition the motion to intervene as *Amicus Curiae* of John J. Marchi; and

WHEREAS on December 2, 1982, this Court denied plaintiffs' motion for summary judgment and granted defendants cross-motion for summary judgment on the ground that the Board of Estimate was not subject to the one person, one vote doctrine; and

WHEREAS, on May 16, 1983, the Second Circuit Court of Appeals reversed that decision and remanded this matter to the District Court, noting, *inter alia,* that "the fact that three members of the Board are elected at large from the entire City raises novel issues as to how an individual voter's opportunity to elect these members should be assessed in conjunction with his opportunity to elect his borough representative;" and

WHEREAS, on August 21, 1984, this Court issued a memorandum and order in which the Court excluded from its computation of malapportionment the presence of the three Citywide members of the Board and, based upon an examination of the population of the five boroughs, found that there exists on the Board of Estimate a 132.9% maximum deviation from population equality and directed the parties to file with the Court a joint stipulation of policies and interests served by the Board of Estimate; and

WHEREAS, said stipulation was filed with the Court on October 18, 1984 and was subsequently supplemented; and

WHEREAS, on October 31, 1984, this Court at a status conference proposed that a hearing should be had on the issue of whether there exists sufficient justification for the existence of a 132.9% maximum deviation; and

Stipulation and Order of Hon. Edward R. Neaher

WHEREAS, counsel for plaintiffs and defendants having conferred as to the appropriate course of action to take in order to expeditiously resolve this matter; and

WHEREAS, defendants submit that, subject to the possibility of eventual United States Supreme Court review of the decision of the United States Court of Appeals for the Second Circuit which held the one person, one vote doctrine applicable to the New York City Board of Estimate, one of the main issues in this case is whether the presence of the three Citywide members on the Board must be taken into acocunt in determining the degree of malapportionment, if any, existing on the Board, and one of the main issues in this case is whether the degree of malapportionment, if any, existing on the Board is justified by one or more of the policies and interests enumerated in the stipulation filed with this Court on October 18, 1984, as supplemented; and

WHEREAS, plaintiffs submit that the Court correctly excluded the presence of the three Citywide members in determining the degree of malapportionment existing on the Board; and that none of these policies and interests enumerated in the stipulation filed with this Court on October 18, 1984 as supplemented, nor any basis exists to justify the 132.9% deviation found by the Court; and submit alternatively that even if the three Citywide members are taken into account in determining the degree of malapportionment, the existing Board of Estimate scheme violates one person, one vote requirements; and

WHEREAS, the parties have filed a document with the Court entitled "Joint Stipulation of Policies and Interests served by the Board of Estimate" in which defendants recite asserted policies and interests in support of the present Board of Estimate scheme and plaintiffs respond

to each of those asserted policies and interests as set forth in the "Joint Stipulation", as supplemented; and

WHEREAS, the parties hereto are in agreement that a hearing calling for the presentation of oral testimony is not necessary at this time;

IT IS HEREBY STIPULATED AND AGREED AS FOLLOWS:

1. That at this time in place and instead of a hearing the parties including amicus curiae will proceed by affidavits and memoranda of law on the policies and interests which may justify deviations from the one person, one vote formula .

2. All parties agree that defendants, intervenors, and amicus curiae shall be permitted to submit further papers within 30 days after this Court approves this stipulation and the parties receive actual notification of such approval; thereafter, within 20 days plaintiffs may respond by further written submissions on the issues raised by defendants including amicus curiae, and defendants including amicus curiae shall be permitted to reply within ten days thereafter to the plaintiffs' submissions.

3. Further, no party or amicus curiae will request a hearing unless such party or amicus curiae can demonstrate that some matter set forth in the submissions is unusual and not amenable to clarification by written submission.

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/s/ ALAN ROTHSTEIN
ALAN ROTHSTEIN
Amicus Curiae Citizens Union*
198 Broadway
New York, New York 10038

SO ORDERED
/s/ EDWARD R. NEAHER,
U.S.D.J.

Dated: Brooklyn, New York
February 13, 1985

* Amicus Curiae Citizens Union will submit papers in accordance with the schedule assigned to plaintiffs.

Affidavit of Robert A. Straniere, Submitted in Accordance With the Joint Stipulation Entered into by All Parties, dated March 15, 1985

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81 Civ. 3920 (ERN)

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, CAROL BELLAMY, as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, ANDREW STEIN, STANLEY SIMON, DONALD MANES, RALPH LAMBERTI, each individually and as Borough Presidents of the boroughs of the City of New York,

Defendants,

—and—

FRANK V. PONTERIO,

Intervenor-Defendant,

ROBERT A. STRANIERE, individually and as a member of the New York State Assembly,

Intervenor-Defendant.

Affidavit of Robert A. Straniere

STATE OF NEW YORK,
COUNTY OF RICHMOND, ss.:

ROBERT A. STRANIERE, a member of the New York State Assembly and an attorney duly licensed to practice law in the State of New York, being first duly sworn, deposes and says:

1. This affidavit is submited in accordance with a joint stipulation entered into by all parties in this action, dated the 13th day of February, 1985, in which it was agreed and ordered by this Court that, in lieu of a hearing calling for the presentation of oral testimony, the parties shall be permitted to submit further papers • on those policies and interests which the Supreme Court has held may justify the 132.9% maximum deviation from population equality found by this Court to exist on the Board of Estimate of the City of New York.

2. I am presently serving my third term in office as a New York State Assemblyman, representing the 60th

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• Given the immediate procedural context of this action, rather than an actual brief, the following "memorandum-styled" affidavit seems to be the more appropriate format for furnishing written testimony (which would have been presented orally had your deponent been called as a witness during a hearing), particularly since the more technical legal arguments on the issue of policy justifications have already been addressed in formal briefs by the various parties, submitted to this Court in October and December of 1983.

While this format is somewhat unconventional, it would appear consistent with the character and nature of these proceedings. As this Court indicated during a "status conference" held on July 1, 1983, the present "one person one vote" challenge to the Board of Estimate should not be treated merely as standard litigation, but more as a "generation of ideas to find a solution to the problem the Second Circuit has presented." (Neaher, D.J., E.D.N.Y.)

Assembly District within the County of Richmond. From 1966 through 1968 I served as Assistant Corporation Counsel of the City of New York, and from 1968 to 1969, I served as Assistant Legislative Representative of the City of New York, representing the Office of the Mayor and the City on legislative matters in the State Legislature in Albany. In 1972, I served as Counsel to the New York State Senate Committee in New York City which acted on all state legislation affecting the City of New York. Finally, from 1965 through 1980, I served as Counsel to State Senator John J. Marchi, the present Chairman of the prestigious Senate Finance Committee.

3. Throughout my twenty-one years of State legislative experience, I have become quite familiar with the operation, structure and increasing role of the Board of Estimate and its effect upon New York City government.

4. Following the May 16, 1983 decision of the U.S. Court of Appeals remanding the present case to this Court for findings concerning the level of malapportionment on the Board and the weight of *state interests* that could justify that level, *Morris* v. *Board of Estimate*, 707 F.2d 686 (2d Cir. 1983), this Court granted my request to intervene so that my interest, as a Staten Island legislator, and the interest of the State Legislature in preserving the Board's present governing structure could be adequately represented in this action.

5. This affidavit seeks to more fully establish this State's policies and interests which clearly justify the level of deviation found to exist on the Board, and the lack of effective alternatives to the Board's present membership

and voting structure if the one person, one vote principle is to be strictly applied.

I. The Policies and Interests of the State

A. *The Creation and Organization of Local Governments*

6. Just as the United States Supreme Court, in *Brown* v. *Thomson*, — U.S. —, 103 S. Ct. 2690 (1983), looked first to Wyoming's Constitution to determine whether that state's legislative apportionment statute could reasonably be said to advance a rational state policy, so do I begin with reference to the constitution of this State. Under Article 3, § 1 of New York's Constitution, the legislative power of this State is vested in the Senate and Assembly, and our State Legislature is given "full power, except as restricted by the constitution, to control by direct legislation the local affairs of a public nature of any of the civil divisions of the state." *People* v. *Tweed*, 63 N.Y. 202 (1875).

7. In addition, while not specifically addressing New York City's Board of Estimate, Article 9, § 2 declares that "the Legislature shall provide for the creation and organization of local governments," and it is for the Legislature to distribute the powers of local government, as between city and county governments, as it may deem best. *People* v. *Dunlap*, 66 N.Y. 162 (1876); *see also Kramarsky*, "The Structure, Powers and Functions of New York City's Board of Estimate," Report to the New York State Charter Revision Commission, (hereinafter cited as *The Kramarsky Study*) at 1, (1973) ("For New York City, the

ultimate seat of governmental authority has always resided in the State Legislature in Albany.").

8. Accordingly, in 1896, a bill was passed by the New York State Legislature and signed into law (Chapter 488, *1896 Laws of New York*) which provided for the expansion of New York City beyond its existing boundaries of the Island of Manhattan through the consolidation of its surrounding areas. The consolidation became effective of January 1, 1898 (Chapter 378, *1897 Laws of New York*), at which time the five counties that now make up the City of New York were to become known as the boroughs of Manhattan, Brooklyn, Queens, Bronx and Richmond (Staten Island).

B. *The Preservation of Counties as Governmental Subdivision of the State*

9. While the Legislature could have abolished the county form of government in Richmond, Queens, New York (Manhattan) and Kings (Brooklyn) counties * and created instead, one county coterminous with the City's enlarged boundaries, the State chose to preserve the existing counties as governmental entities. *See Report of the Charter Revision Commission,* New York State Assembly Documents, Vol. 12, No. 40, xix (1901) ("It is clear that the vast territory comprised within the present City of New York, embracing as it does, districts *so essentially different* as the crowded east side of Manhattan and the rural districts of Queens and Richmond, *demands some subdivision and some degree of local autonomy*.") (emphasis added)

* The Bronx did not become a formal county until 1914 (Chapter 548, *1912 Laws of New York*).

10. Thus, in the eyes of the State, the five component parts of the newly created City of New York would *still* be recognized and considered as five separate and distinct counties within New York State. Indeed today, one need only look through the "New York County Law" (McKinney 1972) (specifically, Article 24, entitled "Provisions Applicable to New York City") to see that over the years, the Legislature has specifically intended to preserve certain "county" features * with respect to each of the five boroughs as separate counties, even though they are wholly within a consolidated New York City.

11. Moreover, throughout the City's eighty-seven year history, despite numerous charter revision commissions that have considered changes in the City's governmental structure, upon information and belief there has never been a suggestion by the Legislature or its charter commissions to abolish the counties as separate entities within the City.

C. *The Presentation of Counties*** *(Boroughs) as Representational Entities*

12. In light of the foregoing discussion, if one happened to be living on Staten Island (Richmond County) at the turn of the century, he or she would have been in the

* The fact that we continue to elect district attorneys from "each of the *counties* of New York, Kings, Bronx, Queens and Richmond" (N.Y. County Law § 926) (emphasis added) and the fact that the office of the county clerk can still be found in each of the "*counties* comprising the city of New York" (N.Y. County Law § 908) (emphasis added) are two illustrations of "county" features intended to be preserved by the State Legislature.

** Throughout the remainder of this affidavit, the term "county" will often be used in place of "borough" to designate any of the five subdivisions of the City.

unique position (vis-à-vis State residents living outside New York City) of residing in a county that was not only a subdivision of the State (as were all counties), but was also a subdivision of the State's largest City. As a resident of a county within the State, the Staten Islander's interests with respect to statewide legislative matters would clearly have been represented in Albany by his or her duly elected State Assemblyman and Senator. However, as a resident of a county within the City of New York, the State was also concerned that the Islander's local interests were adequately represented in City government, particularly since there would be no county legislature or other local governing forum other than that of the City. This became the subject of serious consideration by a governor-appointed charter revision commission which, in 1901, made recommendations for the restructuring of the City's policy-making body, known then as the Board of Estimate and Apportionment.

13. The *1901* Charter gave the Board broad powers that would have a direct and significant impact upon each of the five diverse counties of New York City. Consequently, the aforesaid charter revision commission sought to insure that the varying needs and interests of each county would be adequately addressed by the Board through direct county (borough) representation:

> [T]he facts that the Board of Estimate and Apportionment was given the power to disapprove the decisions of Local Improvement Boards, and to determine the amount of money to be expended out of the treasury of the city in public work in each borough make it proper that the boroughs should have a direct representation on the Board.

Report of the Charter Revision Commission, New York Assembly Documents, Vol. 12, No. 40, at xxv (1901).

14. The State Legislature, reflecting the views of the entire State, adopted the above recommendations and direct county representation through each borough president's vote on the Board has been embodied in New York City's Charter for over eighty-four years. To be sure, this longstanding state policy was not completely free from attack. The role of the borough presidents as county advocates withstood several unsuccessful challenges by various charter commissions between 1907 and 1934. However, the rationale underlying the presence of the borough presidents on the Board was reaffirmed in the recommendations of a 1935 charter revision commission (the Thacher Commission) appointed by Mayor Fiorella La Guardia:

> The Commission is satisfied that there exists in a large part of the city an overwhelming sentiment not only for borough representation on the Board of Estimate but that strictly local improvements, paid for by assessments on the homes of the people in the respective neighborhoods, be entrusted to local officers *readily accessible and responsive to the people affected.* The Commission believes that this desire for local self-government should be recognized where it is possible to do so without sacrifice of efficiency and economy.

Proposed Charter for the City of New York, August 17, 1936 and *Report of New York City Charter Revision Commission,* 1936, pp. 8 and 9. (*See* Appendix to Plaintiffs' Memorandum in Support of Their Motion for Summary Judgment)

D. *Summary: The Unique Relationship Between the City and State of New York*

15. Historically, there has and continues to be a special and unique relationship between the City and State of New York. New York City is the only city of its class in the State, having a "population of one million or more" (a phrase used throughout our statutes to distinguish New York City from all other cities in the State). The City of New York is the only city in the State comprised of two or more counties wholly within its boundaries. Far from an arbitrary system, New York City's governmental structure has received unparalleled scrutiny, recommendations and subsequent revisions as evidenced by the history of its consolidation and the series of State appointed, authorized and approved charter revision commissions which date as far back as 1868, and continue up to the 1973 Goodman Commission, whose recommendations were presented to the voters eight years ago. Indeed, even the City's Administrative Code and continuously amended by formal acts of the State Legislature.

16. The unique relationship described above has also been recognized in other areas including the State's real property tax law. After the 1975 N.Y. Court of Appeals (*Hellerstein*) ruling requiring that all real property in the State be assessed at full value, the State's Division of Equalization and Assessment made the following observations in a February, 1980 "Report on Proposed Reforms in Real Property Tax Administration," at pp. 11-12:

> Currently, the property tax system in New York City is considerably different than in the rest of the State. Over the years, many exemptions and special

> provisions have been enacted with applicability only in New York City. These measures *recognized the uniqueness* of the City. It may now be necessary to more formally recognize the distinction between property taxation within the City and in the rest of the State. The City's Real Property Tax Department recognizes that its assessment rolls are presently in such need of repair that estimates of inter-class shift based on equalization surveys are hazardous at best. . . . The State stands ready to assist the City in exploring the alternatives and developing the most viable solution."

17. In December of 1980, I followed up on the State's offer and pre-filed my first bill as a member of the Assembly, co-sponsored by Senator John Marchi, which sought to establish an assessment system for New York City which maintained the existing relative tax burden of each type of real property within each of the five counties. (Assembly Bill No. A-304, Introduced in the 1981-1982 Regular Session of the Legislature)

18. The point of these illustrations is to once again emphasize the fact that the State has a strong vested interest in the five component parts of a *unique* New York City, not simply as boroughs, but as separate and distinct counties within the State. That interest demands the special treatment that has been consistently extended to these five counties in the laws of this State.

19. In upholding Wyoming's legislative apportionment statute providing at least one representative from each county, the U.S. Supreme Court, in *Brown*, emphasized that Wyoming's policy of preserving county boundaries

was based on the state Constitution, had been followed for decades, and had been applied consistently throughout the State. Moreover, the Court pointed out that this policy had "particular force given the *peculiar size and population of the State and the nature of its governmental structure.*" *Brown* v. *Thomson,* 103 S. Ct. at 2696 (emphasis added).

20. While the *Brown* case might be easily distinguished since the State's entire apportionment plan was not put in issue (although the same could be said about this case since the equal voting power of the borough presidents and not the entire Board is the real issue here), the underlying rationale and the State's policies and interests that were held to justify the level of malapportionment caused by Wyoming's statute are strikingly similar to those advanced by the present voting structure and membership of the Board of Estimate. But this should not come as a surprise to the plaintiffs herein. They have, in fact, agreed (although not unconditionally) that the Board's present makeup advances not less than five policies and interests of this State (the first two of which have already been adressed in the foregoing paragraphs:

1. Preservation of the boroughs as representational entities in local government;
2. Use of natural and historical borough boundaries to define representational entities in local government;
3. Ability to balance differing interests and needs, and to accommodate development and long-term planning requirements of both the boroughs and the City as a whole;

4. Correlation between the functions of the Board and the impact of those functions upon the boroughs, particularly in regard to the formulation of the capital budget, in order to assure that different parts of the City get their fair share of service contracts and capital budget allocation which might otherwise go to those portions of the City contributing the most tax dollars;
5. Ability of the Board as presently constituted to eliminate undue concentration of executive power and to supplement the City Council, which retains the general legislative power of the City.

See "Joint Stipulation of Policies and Interests Served by the Board of Estimate," October 18, 1984. Having already considered "1" and "2", I now turn to the third, fourth and fifth policies analyzed respectively in Parts II, III and IV of this affidavit.

II. The Effectiveness of the Board

21. In its "Memorandum and Order" issued August 21, 1984, this Court directed that the parties, in addition to identifying those policies and interests presently served by the Board, were to specifically examine two particular concerns, one being "the Board's conceded effectiveness" as presently structured. *See* "Memorandum and Order" of District Judge Edward R. Neaher, at 34. (The second particular concern will be explored in Part III of this affidavit.)

22. The Board's "effectiveness" will be analyzed in terms of its ability to achieve "fair and effective represen-

tation for all citizens" of New York City since, according to the Supreme Court in *Reynolds* v. *Sims,* 377 U.S. 533 (1964), this is the basic aim of all legislative apportionment.

A. *The Ability to Balance Differing Interests and Needs of Both the Counties of the City and the City as a Whole*

23. Census figures, demographics and individualized borough planning and zoning resolutions point to at least one clear conclusion: no two counties of the City are alike. Each of the five counties have separate and unique characteristics, including their own history and their own future. But together, they make up an equally distinct municipality governed as one city. And logically, given the sole fact that New York City is a combination of five separate counties, it is only natural that tensions will arise over what is best for the individual county as compared to what is best for the City as a whole.

24. The issue of how best to govern this inherently tension-producing, consolidated City was considered by Walter Lippmann in Werner Kramarsky's report to the State Charter Revision Commission in 1973:

> The city is much too big to be governed as a single centralized unit. It is also too varied in its population and its occupations. It is also too old in the traditions of local independence. On the other hand, of course, the interests of the people in all the boroughs are much too closely related not to be dealt with under city-wide and co-ordinated policies.

The Kramarsky Study, supra, at 15.

25. In 1900, an effective solution was reached when a governor-appointed charter revision commission, responsible for drafting the 1901 Greater New York Charter, gave the City's Board of Estimate its present composition of three city-wide elected officials, and five duly-elected representatives of each of the City's five counties. The importance of direct county representation was also discussed in the *The Kramarsky Study,* at 115:

> The ability of the community leaders to bring their problems directly to the Borough Presidents *contributes to citizen participation in government.* It is unique to the office that a Borough President, as a member of the Board of Estimate, is able to approach the solution of local conflicts with an intimate knowledge of city-wide problems, policies and programs. Bringing the attributes of chief executive of his borough to the deliberations of the Board is a *vital balancing force.* (emphasis added)

26. Even the plaintiffs agree that the presence of the borough presidents and city-wide officials enables the Board to "balance differing interests and needs, and to accommodate development and long-term planning requirements" of both the counties and the City as a whole. See "Joint Stipulation of Policies and Interests" at 7.

B. *Fair and Effective Representation For All Citizens*

27. Without yet considering the size of their vote, the presence of one county representative from each county seems fair on its face, giving each and every county an equal voice in City affairs. Since, by definition, all citizens of the City must reside in one of its five counties, no one

citizen or group of citizens is denied representation on the Board.

28. Effective representation, in light of *Reynolds,* amounts to the ability of a representative to advance the interests of his or her constituency on a substantially equal basis with the other representatives elected to a legislative body that makes governmental decisions affecting their respective constituencies. Given the relatively small size of the eight-member Board, the ability of each county representative to put forth the interests of his or her county is enhanced, as it is much easier to bring to the Board's attention the unique concerns and potential consequences of the county he or she represents before an actual decision is reached on any particular matter. The Board is a collegial body, not some enormous, multi-member legislature where it is often difficult to get in a word during deliberations.

29. Obviously, every interest within a particular county can not always be advanced on every matter acted upon by the Board. However, as long as the county representative continues to be elected by only the respective county's residents, he or she remains directly accountable to the majority views and interests of that county, which are constantly re-aligned with each new issue that is brought before the Board for resolution. As stated above, the presence of the borough presidents contributes to citizen participation in government and the fact that there might be a strong borough-wide consensus on one issue, and a greater level of disagreement on another is simply a fact of political life that each borough president, as a county representative, is faced with.

C. *Summary: The Ordering of Governmental Priorities*

30. Throughout the history of New York City, the Board of Estimate has been the principal body where the difficult task of ordering governmental priorities between competing claims of the component county and city-wide interests "has been deliberately institutionalized." *The Kramarsky Study,* at 15. This rational policy of balancing competing interests has been advanced by the Board's membership and voting structure and has resulted in fair and effective representation for all residents of the City.

31. In my twenty-one years of State legislative experience, I do not recall any measure that came before either house of the Legislature which provided for a change in the Board's present makeup. The State Legislature, in its wisdom, has recognized that the balancing function of the Board contributes substantially to its ability to effectively govern the City and the Legislature has deliberately chosen not to disturb its structure.

32. Finally, even the plaintiffs have admitted that the Board, as presently structured, was designed "to effect compromise between local and citywide interests by seating together borough and citywide officials." *Plaintiffs' Memorandum in Support of Their Motion for Summary Judgment,* December 16, 1983, at 4. In addition they concede that the Board presently works "very well and may be very efficient." *See* June 6, 1982, Hearing Transcript at 53.

III. The Meaningful Participation by the Lesser Populated Counties in Board Affairs

33. The second particular concern which this Court has directed the parties to consider is the "meaningful participation" by the lesser populated counties in Board affairs under the Board's present structure. *See* Memorandum and Order of Judge Neaher at 34. As with the Board's "effectiveness" considered above, "meaningful participation" will be analyzed in the context of "fair and effective representation for all citizens" of New York City, the basic aim of all legislative apportionment under *Reynolds*.

A. *An Equal Voice for Each County*

34. In 1958, as a result of population shifts among the City's five counties, the voting strength on the Board of Estimate was realigned by the State Legislature, giving all the borough presidents equal voting power. *See* Chapter 719, *1958 Laws of New York*. The Legislature recognized then that each of the counties is separate and unique and that in order to effectuate appropriate City-wide policy, *all* of the counties, including the lesser populated Bronx and Richmond counties that were now growing in population, deserved to be treated on equal footing during the Board's decision-making process.

35. As all parties have agreed, the allocation of an equal voice to each of the five county representatives advances the policy of insuring that "different parts of the City get their fair share of service contracts and capital budget allocations." *See* "Joint Stipulation of Policies and Interests" at 8.

B. *Fair and Effective Representation:*

A Hypothetical City

36. Consider the following hypothetical city:

> The City of Grymes is composed of five districts of equal geographic area. While the total population of Grymes is 100,000, only 5,000 persons live in the one of the five districts. However, the smallest district is growing at an enormous rate, outpacing all the other districts, and the smallest district has the greatest proportion of undeveloped land within its boundaries. Finally, assume that the two most important governmental functions carried out by the City of Grymes, through its legislative body, are the delivery of municipal services and determining land use citywide.

37. If a strict one person, one vote formula were to apply to the above city's general legislative body, clearly the four largest districts would be able to dictate not only what services the smallest district would receive, but more importantly, would decide how best to utilize that district's greatest proportion of undeveloped land. Future planning would rest almost entirely in the hands of those representing the largest districts. Ironically, decisions could be made by those least familiar with the needs and interests of the smallest district (that has only 1/20th of all votes).

38. This exaggerated and oversimplified hypothetical serves to illustrate one very important consideration in applying a strict one person, one vote formula to local governments: decisions over matters affecting citizens *closest to home*, i.e. land use and the delivery of municipal

services, could be made by the proper legislative body without carefully addressing the specific interests of those who stand to gain or lose the most as a result of those decisions. The New York State Legislature, in structuring the Board so as to provide *equal* county representation on the Board, sought to avoid this possible harsh result.

39. Staten Island (Richmond County) continues to grow at an enormous rate and holds the largest proportion of undeveloped City-owned property among the five counties. Since careful planning is certainly incident to rapid growth, the mapping and zoning functions of the Board of Estimate will, quite naturally, continue to have the single greatest impact upon this, the least populated county within the City. Given the fact that these land use and development decisions made by the Board are often viewed as "purely local" in effect, it is essential that the State continue to provide the residents of Staten Island an equal contributing voice in the making of these important county-wide decisions.

40. As all the parties herein have agreed, there exists a "correlation between the functions of the Board and the impact of those functions upon the boroughs." *See* "Joint Stipulation of Policies and Interests" at 8. The policy of assuring that the different parts of the City receive fair treatment is presently advanced by the Board's current voting structure. Given the impact the Board will continue to have in Richmond County, that voting structure must be preserved to insure Staten Islanders fair and effective representation on the Board.

C. *Preventing a "Tyranny of Pure Numbers"*

41. The exaggerated hypothetical above illustrates the possibility of a "tyranny of pure numbers" since, strictly applying the one person, one vote mandate, the smallest district would always have only 1/20th a share of the voting power although it contains one fifth of the total geographic area of the City of Grymes. Serving with the State Legislature under both the Republican-controlled Senate and the Democratic-controlled Assembly, I have seen first hand the effects of this "tyranny of pure numbers." I have experienced both the benefits of working within the majority party as well as the frustrations of being in the minority. The mere fact that one political party possesses the greater number of votes within a legislative body allows it the privileges of setting agendas, controlling deliberations (who can speak first) and preserving their majority of votes on all committees. When in the minority, it is difficult just to get legislation passed. And in my twenty-one legislative sessions, I do not recall a single instance where a member of the minority party in either house was able to have an amendment prevail when offered directly from the house floor during debate.

42. While a majority and minority of votes on the Board can not be waived as aligning along political party lines, the dynamics of pure voting numbers could manifest along geographic lines among the county representatives on the Board. If one person, one vote principle were to be strictly applied to the Board, the county representatives from Brooklyn and Queens would, in effect, become the majority party on the Board simply because they would control the greatest number of votes among the borough presidents. The process of ordering government priorities

between city-wide and local interests would be controlled entirely by the interests of Brooklyn and Queens, interestingly the only two counties that are connected other than by the City's bridges and tunnels (there is no clear geographic dividing line between the counties).

43. By affording each county representative on the Board an equal voice, the Legislature has provided a "check and balance" against a "tyranny of pure numbers" among local interests. Without it, the status of Staten Island's Borough President would be translated to that of a "mere observer" over the Board's deliberations. The State has recognized that the interests of each county, including Staten Island, must be adequately considered. In order to accommodate these diverse interests, New York City has been afforded a greater degree of flexibility in its governmental structure. No other subdivision of this this State is faced with such diversity in so limited an area.

44. The United States Supreme Court has also recognized the possibility of a "tyranny of pure numbers" among local governments (the entities which have the most direct affect upon the citizens of the states). While state legislative reapportionment plans are held to a lower standard than congressional redistricting plans (permitting greater deviations from the ideal of absolute numerical equality and recognizing more justifications for such deviations), local governments are given even greater latitude:

> . . . Indeed, the Supreme Court has noted that the constitutional principles that govern the apportionment of state legislatures are not necessarily applicable to the organization of local legislative bodies.

> "Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation."

Greenwald v. *Board of Sup'rs of County of Sullivan,* 567 F. Supp. 200, 203 (1983) (quoting *Sailors* v. *Board of Education,* 387 U.S. 105, 110-111 (1967)).

IV. The Board Decentralizes Executive Power and Supplements Legislative Power

45. The last underlying policy, which the parties agree is served by the Board as presently constituted, is the ability of the Board to eliminate undue concentration of executive power and to supplement City Council's legislative power. By allowing county representatives to vote on matters of city-wide concern, the Board clearly reflects the desire to decentralize the power of the Mayor among the subdivisions of the City.

46. The Second Circuit has already ruled that the Board performs "general governmental functions," *Morris* v. *Board of Estimate,* 707 F.2d 686 (2d Cir. 1983), some of which could be considered as supplementing City Council's legislative role, i.e. budget review and land use (zoning) decisions.

47. Finally, the fact that the Board of Estimate coexists with the City Council was considered in *Andrews* v. *Koch,* 528 F. Supp. 246 (1981). There, the allocation of two at-large seats in the City Council for each of the

City's five counties was held to have violated the one person, one vote mandate. In dismissing the defendants' claim that the population deviations were justified because of the need to recognize the local concerns of each borough, this very Court relied, in part, on the fact that "additional channels of communication exist between the boroughs and City Hall through the Borough Presidents, who sit on the Board of Estimate." 528 F. Supp. at 251. This Court also had noted that "while it may be true that more power resides in City Hall, judicial notice may be taken that each Borough President still has a vote on the Board of Estimate." *Id.* at 249.

48. This Court's opinion in *Andrews* correctly implies that the Board not only supplements the legislative power of City Council, but also advances a rational policy of balancing local and city-wide interests as a result of the borough presidents' voice on the Board.

V. No Clear Alternatives

49. While not directed to do so, a few words concerning the possible alternatives to the Board are in order here. Basically, a strict application of one person, one vote formula to the Board of Estimate could lead to one of two possible alternatives. Both involve increasing the larger boroughs' voting power, the first by way of a weighted voting system, and the second by way of increasing the membership of the Board.

50. Obviously, if the State Legislature were to adopt a weighted voting system for the Board, allocating a greater number of votes to the borough presidents of the

farmland that can be easily sliced up into portions that bear no relationship with each other (except possibly for the fact that each has roughly the same population). This second alternative is just as unworkable as the first and contradicts the underlying policies that have preserved the Board as an efficient and effective governing body for this extremely diverse City.

52. Finally, the plaintiffs have suggested that under a scheme of neighborhood districts under the second alternative, representatives of neighborhoods demographically similar to the characteristics of Staten Island would vote together on measures before the Board because of similar economic interests. This suggestion, however, ignores the fact that a great majority of the decisions made by the Board are geographically oriented, affecting only certain parts of the City with each new measure acted upon. While a white, middle-class, college-educated resident of Staten Island might have overall economic interests similar to that of a resident of Bay Ridge, Brooklyn, with similar demographic characteristics, that will not keep a Staten Island representative from supporting, and a Bay Ridge representative opposing a plan to build a resource recovery plant in Brooklyn, as opposed to on Staten Island. As long as the Board of Estimate continues to decide issues affecting the use of land, the delivery of municipal services and capital projects, and development planning throughout the City, the interests of City residents will continue to align along geographic (i.e. county) rather than demographic boundaries.

CONCLUSION

For all the foregoing reasons, your deponent submits that the present voting structure and allocation of seats on the Board of Estimate, as provided by sections 61 and 62 of the New York City Charter, should be upheld as not violative of the Fourteenth Amendment to the United States Constitution.

Dated: Staten Island, New York
March 15, 1985

/s/ Robert A. Straniere
Robert A. Straniere
Intervenor-Defendant
182 Rose Avenue
Staten Island, N.Y. 10306
(718) 667-0314

/s/ Albert P. De Lillo
Notary Public

Sworn to before me this 15th day of March, 1985

Affidavit of John J. Marchi, Read in Support of the Continuation of the Present Voting Structure of the Board of Estimate, dated March 15, 1985

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81 Civ. 3920 (ERN)

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, CAROL BELLAMY, as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, ANDREW STEIN, STANLEY SIMON, DONALD MANES, RALPH LAMBERTI, each individually and as Borough Presidents of the boroughs of the City of New York,

Defendants,

—and—

FRANK V. PONTERIO,

Intervenor-Defendant,

ROBERT A. STRANIERE, individually and as a member of the New York State Assembly,

Intervenor-Defendant.

Affidavit of John J. Marchi

STATE OF NEW YORK,
COUNTY OF RICHMOND, ss.:

JOHN J. MARCHI, being duly sworn deposes and states:

1. I reside in Richmond County, Staten Island, New York, having lived on Staten Island my entire life, except for periods of military service.

2. I represent the 24th Senatorial District in the New York State Senate, which encompasses all but a small portion of Staten Island. I was first elected to the Senate by my Staten Island constituents in 1956, having gained re-election in each subsequent election. Until the reapportionment following the 1980 census, I was the only Senator from Staten Island, with the enormous population growth entitling my county to one full and a portion of another Senatorial District. (The other Senatorial District, the 25th is composed primarily of lower New York County, with a small portion of Richmond County.)

3. Since 1973, I have served as Chairman of the New York State Senate Finance Committee. Since my election to the Senate, I have been intimately involved with legislation concerning the City of New York, having served as Chairman of the New York State Senate Standing Committee on the Affairs of New York City from 1963 to 1973 (except in 1965). I have for several years been the lead sponsor on several, if not most, of the bills in the New York City legislative program. My interest in and concern for the City of New York sparked by two ill-fated runs for New York City Mayor in 1969 and 1973.

4. After this case was remanded from the Second Circuit Court of Appeals (707 F2nd 690) to the Eastern Dis-

trict, I moved to intervene as an *Amicus Curiae* and filed a brief in that regard.

5. Since the degree of malapportionment present has already been decided in this Court's memorandum and order dated August 21, 1984, this Affidavit is directed to the remaining portion of the Second Circuit's remand which directed a determination of the *"weight of state interests alleged to justify whatever level of deviation exists* or whether the combination of at-large and local seats, in the context of the voting procedures of the Board, creates a system of representation that satisfies constitutional standards for instruments of local governments" and "rule on the policies and interests which the Supreme Court has held *may justify deviations* from the literal one person one vote formula" in conjunction with the Court in footnote 3 noting "the fact that three members of the Board are elected at large from the entire city raises *novel issues* as to how an individual voter's opportunity to elect these members should be assessed in conjunction with his opportunity to elect his borough representative." (*emphasis added*) Also submitted and attached as exhibits hereto, are various other affidavits all directed to this question of the policies and interests which justify the retention of the present composition and voting structure of the Board of Estimate. (Exhibit A, Affidavit of Loring McMillen (hereinafter referred to as the McMillen Affidavit); Exhibit B, Affidavit of Albert V. Maniscalco (hereinafter referred to as the Maniscalco Affidavit); Exhibit C, Affidavit of James F. Regan (hereinafter referred to as the Regan Affidavit); Exhibit D, Affidavit of Les Trautmann (hereinafter referred to as the Trautmann Affidavit); Exhibit E, Affidavit of David Jaffe (hereinafter referred to as the Jaffe Affidavit). All references I make to these affidavits are based upon information and belief.

6. To understand the rational state policies which underlies and justifies the composition of the Board of Estimate, it is important to note some very basic, yet salient facts: New York City, composed of five boroughs which are also five individual counties of the State, is a municipal corporation, created by the Legislature as "an agency of the State for conducting the affairs of government and as such it is subject to the control of the Legislature." (*Matter of LaGuardia* v. *Smith,* 285 N.Y. 1 at 7 (1942).

7. As is detailed in the McMillen Affidavit (¶¶ 9-10) drawn by an expert on Staten Island history, prior to consolidation Staten Island as the County of Richmond was governed under a system of county government with each of its five townships electing a member of its Board of Supervisors. The people elected numerous county officials, including surrogate and county judges, district attorney, sheriff, county clerk and treasurers. Each town also elected four justices of the peace, a board of assessors, four constables, town clerk, three excise commissioners and a highway commissioner. Additionally, there were four incorporated villages with each having its own local government and electing a board of trustees, health officer, clerk, treasurer and engineer. Obviously, the people of the County of Richmond prior to consolidation were directly responsible for electing those officials who governed their county.

8. After the 1894 referendum in which Staten Islanders overwhelmingly voted for consolidation, there were numer-

ous hearings concerning the subject of the consolidation of Richmond County and other areas surrounding Manhattan into Greater New York. There was extensive debate on the subject, with numerous arguments being advanced on both sides of the issue. According to the McMillen Affidavit, there was never raised the question of adequate representation of Staten Island in the City's governing bodies, with the Staten Island voters and leaders "obviously . . . satisfied that the Island, small in population as compared to the rest of the proposed boroughs would be adequately represented." (McMillen Affidavit ¶ 10)

9. It is also very interesting to note that during the period in the mid 1890's when Richmond County was considering this consolidation issue, it was actively pursuing another option—incorporating as a city of the second class, an independent municipality within New York State. (McMillen Affidavit ¶¶ 13-15) The Richmond County Board of Supervisors had established a Committee on City Charter to examine the possibility of Richmond County becoming an independent city. The Committee researched all the statutes relating to Richmond County governance as well as the Constitutional and Statutory provisions relating to establishing Richmond County as an independent city. In 1896, the Committee concluded that such action could be accomplished, but recommended that since the movement for consolidation, which had been approved by the Staten Island voters, appeared to be close to reality, any action on a separate city should be postponed. (McMillen Affidavit ¶ 15) Such action on a separate city was never taken, since consolidation became a reality on January 1, 1898.

10. In the expert opinion of Borough Historian Loring McMillen:

> *"The citizens and officials of Richmond County of late 1890s would never have chosen to give up their own county form of government or their plans to pursue an independent city form of government if they knew, or even suspected, that they or their successors would not have had a meaningful voice in the major decisions affecting their county." (emphasis added)* (McMillen Affidavit ¶ 19)

11. With the consolidation, the "outer boroughs" (all but Manhattan) gave up their own forms of government in return for becoming part of the municipal government of New York City. An implied condition of this "contract" of consolidation was, as can be seen from the expert opinion of Borough Historian Loring McMillen, quoted in paragraph 10 above, that Richmond County would have a meaningful voice in the major decisions affecting their county. If the plaintiffs' position prevails this implied condition will have been breached, with Richmond County stripped of any role in the determinations made by the Board of Estimate, determinations that can and do impact so greatly on this county and its future.

12. The State statute that consolidated New York City also enacted the First Greater New York Charter (Chap. 378, *Laws of 1897*). With the consolidation, New York City was composed of five boroughs, four of which were already counties in New York State. (Richmond, Queens, New York and Kings were four of tne original twelve New York Counties: the fifth borough, the Bronx, did not become a county until 1914).

13. In the 1901 Charter (drafted by a New York State Charter Revision Commission created by Chapter 465, Laws of 1900), the Board of Estimate (then called the Board of Estimate and Apportionment) was given its present composition of the city-wide officials and the borough presidents. The State Charter Revision Commission specifically noted that it was *"proper that the Boroughs should have a direct representation on the Board"* [*New York State Charter Revision Commission at XXIV, XXV (1900)*]. In the years which have followed, the State has played the lead role in determining the governance of the City, and has purposely maintained the meaningful borough presence not only on the Board of Estimate but in other governmental entities within the City of New York.

14. The extent of the State's role in the governmental structure of the City is evidenced by the sheer number of times an act of the Legislature has amended either the New York City Charter or the New York City Administrative Code. A staff review of the Legislative Indexes reveals that since 1907 (the pre-1907 indexes group all Session Laws affecting New York City together, without any separate category for the Administrative Code or Charter), there have been 1,064 Session Laws specifically amending the New York City Administrative Code, and 594 Session Laws amending the New York City Charter. If one adds to these amendments the number of major charter changes that have been effectuated by New York State Charter Revision's Commissions (detailed in the *Amicus* brief I previously submitted to this Court), the enormous involvement of the State in the governmental structure of the City is evident.

15. Despite the fact that the Charter has been revised hundreds of times since the 1901 Charter, there has never been a change in the composition of the Board of Estimate and there have been only two changes (both by state statute) in the voting structure.

16. The next major charter revision after 1901, took effect in 1938 as the result of the 1936 New York City Charter Revision Commission and in it the Board of Estimate specifically maintained the meaningful presence of each borough president. Even though this Commission made some major changes in the powers of the Board of Estimate, it left the Board's composition and voting structure intact, stating that Board "must be representative, and some of its members must be intimately familiar with the conditions and needs of the boroughs" with each borough having the "right" to "separate and direct representation in the administration of the city's government," and, with such representation being "not only important in the interest of the boroughs but in the interest of the city as a whole" [*City Charter Revision Commission* at 15, 19 (1936)]. Neither the 1960 New York State Charter Commission which drafted the 1963 Charter, nor the 1975 New York State Charter Revision Commission changed the composition of the Board, with the 1975 Commission specifically noting that the Board's "mixture of City wide and borough officials provides a balanced perspective," with the Board "forged from singular historical development and attributes of New York City and its distinct geographic parts" [*Recommendations of the New York State Charter Revision Commission for New York City* at 1-2 (1975)].

17. The only changes in the voting structure of the Board came by State legislative action in 1958 and 1978. Through Chapter 719, *Laws of 1958,* the five borough presidents were all given two votes, and the city-wide officials were each given four votes. Through Chapter 761, *Laws of 1978,* the city-wide officials were each given two votes and the five borough presidents were each given one vote. As is detailed in the *Amicus* brief (pp. 11-13) and in the Maniscalco Affidavit, (¶¶ 20-23) the 1958 change in the voting structure gave cognizance to the tremendous population growth of Bronx, Queens and Staten Island. The Maniscalco Affidavit makes two very significant points on the 1958 change—first, even before 1958 when the Borough Presidents of Staten Island, Queens and Bronx had only one vote to two votes for the Borough Presidents of Manhattan and Brooklyn, the role of each Borough President was still significant, with his vote being able to influence the outcome of a close vote and each Borough President viewed as a full participant in the Board's deliberations (Maniscalco Affidavit ¶ 19); second, the 1958 change specifically rejected any move to raise the Queens and Bronx Borough Presidents to two votes while leaving the Staten Island Borough President with one vote, with the change applying to all boroughs, in order to maintain the treatment of all Borough Presidents as full participants in the Board's deliberations. (Maniscalco Affidavit ¶ 23)

18. It is most important to note, as pointed out in the McMillen Affidavit (¶ 17) and the Maniscalco Affidavit (¶ 24), that while the membership and voting structure of the Board of Estimate has changed little since the early 1900s, the powers that the Borough Presidents exert over their boroughs' affairs has diminished greatly. With the

reduction of the Borough Presidents' powers comes the heightened importance of a meaningful borough presence on the Board of Estimate. Indeed, as a former Borough President points out

> "the meaningful presence of each Borough President on the Board of Estimate [is] of paramount importance and indeed much more vital than during the years that the Borough President had enormous powers and a significant voice in the running of his borough." (Maniscalco Affidavit 24)

19. As I pointed out in the *Amicus* brief (pp. 20-24), the State concern that each borough have a meaningful voice in their governance is manifested not only by the treatment of the Borough Presidents in the Board of Estimate, but also in other legislation totally unrelated to the Board. Some of the examples of state statutes which carry out this state policy for meaningful borough role are:

> (a) *The New York City Board of Education.* By virtue of Chapter 915, *Laws of 1973,* the New York City Board of Education is composed of seven members. Each borough president appoints one member who must reside in his borough and the Mayor appoints two members who can reside anywhere in New York City. I was intimately involved in the passage of this legislation, being the bill's Senate Sponsor. As is reported in the *Amicus* brief (pp. 20-23), there was stiff opposition to the borough appointments, with charges of the "perpetuation of petty borough oriented politics to the detriment of both city-wide and local community interests (*see* p. 22 of the *Amicus*

brief). We in the Legislature as well as the Governor rejected this charge, feeling that each borough, regardless of size, has the right to a meaningful role in the running of the City's educational system, with the only way to provide such meaningful borough presence being to give each borough one appointment. As is pointed out in the Regan Affidavit, (¶ *10*) the composition of the Board of Education has been a significant factor in the running a school system with close to 1 million students (more than the population of all but 6 cities in the United States) from diverse backgrounds and with distinct educational needs and problems. As is also pointed out in the Regan Affidavit (¶ *16*) this equal borough representation on the Board of Education has not resulted in any borough getting any more or any less than its fair share of educational dollars.

(b) *Port Authority Projects.* Chapter 651, *Laws of 1978* which granted to the Port Authority of New York and New Jersey the power to initiate major industrial development projects contains an important provision which also exemplifies this State policy of mixing City-wide interests with borough concerns. Although the statute gives the Port Authority sweeping powers regarding the location and types of projects in the bi-state region, it specifies that an area within New York City can only be included in the Port Authority's master plan after a request by the Mayor for a feasibility study of this location. Notwithstanding the Mayor's request, each Borough President can veto the location of any project to be located within his borough. (§ 7173 *New York Unconsolidated Laws*).

(c) *The Board of Trustees of the City University* (commonly known as the New York City Board of Higher Education). By state statute (§ 6204 *Education Law*), the Board of Trustees has seventeen members—ten appointed by the governor and five appointed by the Mayor (with two *ex-officio* members of the City University Student and Faculty Senate). Of the five mayoral appointments, there must be at least one from each borough; of the ten gubernatorial appointments, there must be at least one from each borough. As the Maniscalco Affidavit (¶ 25) points out, the philosophy behind the Board of Higher Education and the Board of Estimate is the same—effectively running the business of the City (or City University) while attempting to meet the needs of each component of the entity. Also, as the Maniscalco Affidavit (¶ 28) points out, the fact that the smallest borough has the same number of mandated appointments as the largest borough has not resulted in any borough receiving any more or any less than its fair share.

(d) *New York City Industrial Development Agency.* § 917 *General Municipal Law* provides that the New York City Industrial Development Agency must have on its board at least one resident from each borough.

(e) *New York City Industrial and Commercial Incentive Board.* § 489-bbb *Real Property Tax Law* which provides authorization for the creation of the New York City Industrial and Commercial Incentive Board, mandates that the borough president or his designated representative shall be a member of "such board for the purpose of taking action with respect to property located in his borough."

(f) *New York City Board of Elections.* § 3-200 *Election Law* established a New York City Board of Elections, consisting of ten commissioners, of which there must be two from each borough.

(g) *New York City Transit Authority Advisory Council.* § 1204-A of the *Public Authorities Law* created the New York City Transit Authority Advisory Council, with fifteen members, five of which shall be appointed upon the recommendation of each of the five borough presidents.

(h) *New York City Planning Commission.* § 192 *New York City Charter* established the New York City Planning Commission, with a Chairman and six members, with at least one from each borough.

20. As the preceding paragraphs have shown, in the years since the consolidation of New York City, the Legislature has enacted numerous laws aimed at guaranteeing each New York City borough a meaningful voice in their governance. These same years have seen a significant change in the local home rule powers applying to most of the sixty-two counties of the State, to all the counties except the five counties comprising New York City.

21. At common law, counties and towns were considered merely divisions of the State organized for the convenient exercise of portions of the political power of the State [(*Cleveland* v. *Lancaster*, 239 A.D. 263 *aff'd.* 264 New York 568 (1933)]. From the time of the 1894 New York State Constitution provision has been made for each county except for a county wholly included in a city "to elect a board of supervisors or other elective body." From

the time of that Constitution until 1963, there were only minor constitutional amendments relating to county form of governments, with no additional grant of local power. The truly significant change came in the 1963 New York State Constitution, with a new Article IX containing a "Bill of Rights for Local Governments."

22. *The Public Papers of Governor Nelson A. Rockefeller* (1962) at 824-825) contains the Governor's memorandum issued when the Concurrent Resolution proposing Article IX was introduced. The Article "provides for the first time a 'Bill of Rights for Local Governments'; broadens the existing home rule powers of counties, cities and larger villages . . . including a new concept of home rule powers, and free local government."

The Governor's memorandum notes that the new "Bill of Rights for Local Governments" embodies a new concept of state-local relations . . . expressly recognizing that the *'expansion of powers for effective local self-government is a purpose of the people of the state.'* The memorandum also states that the amendment *"provides guarantees against impairment of the powers of one municipality by the exercise of local legislative powers by another."* (*id.* at 825) (*emphasis added*)

23. *New York State Constitution* Article IX embodying this "Bill of Rights" for local governments was adopted in 1963. It is most significant to note that this Bill of Rights specifically applies to all counties "except those wholly included within a city" (the five counties of New York City are the only counties in the State wholly included within a city) and with all "the rights and powers of local governments specified in this section insofar as applicable to any county within the City of New York shall

be vested in such City." (Article IX § 1 *New York State Constitution, as amended*)

24. If the plaintiffs prevail in this lawsuit and the Board of Estimate is reapportioned according to borough population, Staten Island's Borough President would, in the words of the plaintiffs own expert, be "a mere observer in the Board's deliberations." (Kramarsky, "The Structure, Powers and Functions of New York City's Board of Estimate, *see* p. 27 *Amicus* brief). To deprive Staten Island of any right to influence this Board's determinations, which impact so significantly on this County, is in direct conflict with the spirit of the "Bill of Rights for Local Governments," which was passed to prevent the occurrence of just such a result. I voted for this "Bill of Rights" in the 1962 and 1963 legislative sessions (as did a majority of legislators and New York State voters in the 1963 general election). I was convinced of the need for constitutional guarantees to insure effective local self-government. I am equally convinced that if the result the plaintiffs are advocating in this lawsuit was anticipated by state officials in the early 1960s, this statute would never have been passed without the inclusion of safeguards for the self governance of all sixty two counties, including the five counties of New York City.

25. The result urged by the plaintiffs would effectively deprive the County of Richmond (which if a separate municipality would be [upon information and belief] the 2nd largest city in New York; the 35th largest city in the United States; and bigger than the NATO-member nations of Iceland and Luxembourg) of a meaningful voice in the determination of its future. With a Board of Estimate voting structure based upon county population the

practical result would be that the counties of Kings and Queens could control the fate of determinations that greatly affect the County of Richmond. This is certainly the opposite result than intended by Article IX of the Constitution which sought to provide "guarantees against impairment of the powers of one municipality by the exercise of local legislative power by another (see ¶ 22, *supra*). It is also in conflict with the sentiment expressed by the Court of Appeals in *Rathbone* v. *Wirth*, stating that "local governments even the smallest division of the State are the preparatory school in which the citizen acquires the rudiments of self government, and hence these institutions have been justly regarded as the nurseries of civil liberty" (15 N.Y. 459 at 487 (1896).

26. This affidavit has already shown the historical and state public policy reasons why the Board of Estimate's present voting system should remain undisturbed. There are two other basic reasons for leaving it unchanged—one, it is needed and two, it works.

27. As was recognized in the preface to the statute effecting consolidation there were tremendous problems commensurate with formulating a structure to govern this new Greater New York:

> "To fuse the multifarious powers, duties and functions of the various municipalities conceived, involving as they do the conveniences, the necessities, the nearest interests of 3,000,000 of people into a unit of government care and control was a task of no ordinary magnitude." (Greene, Preface to Chapter 378 *Laws of New York* at iv (1897).

28. The Greater New York of 1898 was unique within the country, was very large and was composed of diverse

and distinctly different parts. The New York City of 1985, as is shown in the Jaffe Affidavit (¶¶ 5, 6) is unique within the country, is large and is composed of diverse, distinctly different parts. The Borough of Staten Island is, in terms of geography, population, housing and community feeling very different from the other four boroughs (see Trautmann affidavit ¶¶ 16-20, 63, 64; Regan affidavit ¶¶ 12, 17, 18; *Amicus* brief pp. 24-27). New York City has long been a "showcase of American democracy and a haven for diverse groups; it has been a national symbol of success, and the financial, cultural and communications capital of the world" (*Final Report of the State Charter Revision Commission for New York City* at 1 (1975). Upon information and belief, the reasons prompting the 1900 Charter Revision Commission to give the Board its present composition, deeming it "proper that the Boroughs should have a direct representative on the Board" (*supra* at ¶ 13) are as valid today as they were in 1900.

29. The Board's makeup, purposely conceived to insure that "some of its members must be intimately familiar with the conditions and needs of the boroughs" (1936 *City Charter Revision Commission* at 15) is significantly similar to the composition of the City Council of Virginia Beach, Virginia. As is discussed at length in my *Amicus* Brief (pp. 29-32), the Supreme Court case of *Dusch* v. *Davis*, 387, U.S. 112 (1967) upheld the Virginia statute which provides that the council "shall consist of eleven members, one to be elected by the city at large from among the residents of each of the seven boroughs and four to be elected by and from the city at large" (Va. Acts of 1966, Chap. 39). The reasoning behind the composition of the Virginia Council is identical to the reasoning behind the

composition of the Board, namely the mixture of local and City wide interest. The Supreme Court's language in *Dusch* is, in my opinion, equally applicable to the Board of Estimate's purpose and justification, "[the plan] reflects a detente between urban and rural communities that may be important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside." (*Dusch* v. *Davis, Supra* at 117)

30. Indeed, as is (upon information and belief) stated in an affidavit by Mayor Edward Koch submitted in support of the Board of Estimate's voting structure, the Board operates very effectively in carrying out its functions in helping to govern this complex city, pointing out that in the mid 1970's the Board struggled with—but weathered—the most serious fiscal crisis with which any major American city has had to grapple in modern history.

31. A recent example that comes to mind of the Board effectively meeting a complex problem of the City was its vote concerning the construction of resource recovery plants within the City. On December 20, 1984 the Board voted for the construction of eight garbage burning recovery plants to be built throughout the five boroughs in the next thirteen years. The need for some long-term plan to deal with the City's 22,000 tons a day of garbage had long been recognized by City and State officials (*see* Chap. 560 Laws of 1980 entitled "Solid Waste Management Law"). While the need was acknowledged, the practical problem of where to build the plants, which would undoubtedly generate opposition from residents living near the proposed sites, remained. The vote to build eight

plants in specific locations within all five boroughs showed not only the Board's effectiveness in dealing with major city problems, but also the collegial nature of the Board, with the city-wide and borough officials deliberating to confront an issue. The resource recovery vote was passed with a vote of 8-5; the Mayor (with two votes), Queens Borough President Donald Manes, Bronx Borough President Stanley Simon, Manhattan Borough President Andrew Stein and Staten Island Borough President Ralph Lamberti, with one vote each all voted for passage; the other two city-wide officials, Comptroller Harrison Goldin and City Council President Carol Bellamy (each with two votes) joined with Brooklyn Borough President Howard Golden to vote against the plan. From newspaper accounts regarding the vote, it was clear that Comptroller Goldin was actively attempting to defeat the plan, stating that although he generally agreed with the plan, he opposed the location of the first resource recovery plant at the Brooklyn Navy Yard, near the Williamsburg section of Brooklyn (see Staten Island Advance 3/3/85 at 1). His involvement as a City wide official in what was in effect a purely local Brooklyn issue shows that it is not possible to categorize the membership of the Board on the basis of whether they are city wide or borough wide officials.

32. As this affidavit has shown, there are strong justifications for the present voting structure of the Board of Estimate to remain unchanged. The rational state policy of insuring a blend of Citywide interests with local concerns has been consistently applied to the Board since 1901 and is manifested through numerous state statutes aimed at assuring a meaningful borough voice in affairs which affect their borough. The Board's composition and

voting structure are needed to assist in the governance of this unique city which is the financial, cultural and communications capital of the world; the Board's composition and voting structure are needed to assure that the special needs and concerns of each borough, particularly Staten Island which is so different from the others, are met. A change in the Board's composition and voting strength would be a breach of an implied condition under which Richmond County gave up its own self governance and entered into Greater New York in 1898 and would result in the residents of the fastest growing N.Y.S. County, being deprived of a chance to influence decisions which have a great impact upon their county's future. I am reminded of a poem by a great poet who resided on Staten Island—in "Outwitted" Edwin Markham wrote:

> "He drew a circle that shut me out.
> Heretic, rebel, a thing to flout,
> But Love and I had the wit to win:
> We drew a circle that took him in"

If the plaintiffs' position prevails, a circle will have been drawn shutting the county of Richmond out.

33. Based upon the foregoing, I respectfully request that this Court find that these are sufficient policies and interests to justify the continuation of the present voting structure of the Board of Estimate.

/s/ John J. Marchi
John J. Marchi

Sworn to before me this 15th day of March, 1985

/s/ Patricia E. Perez
Notary Public

Exhibit (A): Annexed to the Affidavit of John J. Marchi

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81 Civ. 3920 (ERN)

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, CAROL BELLAMY, as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, ANDREW STEIN, STANLEY SIMON, DONALD MANES, RALPH LAMBERTI, each individually and as Borough Presidents of the boroughs of the City of New York,

—and—

FRANK V. PONTERIO,

Intervenor-Defendant,

ROBERT A. STRANIERE, individually and as a member of the New York State Assembly,

Intervenor-Defendant.

AFFIDAVIT OF LORING MCMILLEN

Exhibit A Annexed to the Affidavit of John J. Marchi

STATE OF NEW YORK,
COUNTY OF RICHMOND, ss.:

LORING MCMILLEN, being duly sworn deposes and states:

1. I reside in Richmond County, Staten Island, New York, having lived in Staten Island my entire life.

2. I was educated in the New York City public school system, and graduated from Union College, Schenectady, New York.

3. I am a licensed professional engineer, but have spent a good deal of my life pursuing my interest in local history.

4. I was the Founder and Director of the Restoration of Richmondtown, a typical small American 18th and 19th century community, the former county center of Staten Island.

5. From 1932-1978, I was the full-time director of the Staten Island Historical Society and the Richmond Restoration.

6. I have been the official Borough Historian of Richmond County for over fifty years, since 1934.

7. I have written several articles on local history and lectured extensively on the subject and am listed in *"Who's Who in the East"* and Who's Who in American Education.

8. I have researched carefully the various contemporary accounts contained in newspapers, histories and related

literature concerning the events leading up to and culminating in the establishment of the Greater City of New York in 1898.

9. I submit this affidavit in support of the defendant's position that history dictates that the composition and voting structure of the Board of Estimate remain unchanged.

10. Richmond County, comprising the whole of Staten Island was one of the original twelve counties of New York State (along with Albany, Cornwall, Dukes, Kings, New York, Orange, Queens, Suffolk, the Dutchess, Ulster, and Westchester). At the time of its consolidation into New York City, it was a steadily growing county, with a population of 65,000 in 1898 as opposed to 38,950 in 1880.

11. Prior to consolidation, Staten Island was governed under a system of county government with each of its townships (Northfield, Southfield, Westfield, Castleton and Middletown) electing a member of the governing Board of Supervisors, which chose its own president. Numerous officers were elected by the people on a countywide basis —county judge, surrogate judge, district attorney, sheriff, county clerk and treasurer.

12. In addition to the countywide offices, each town also elected four Justices of the Peace, a Board of Assessors, Tax Collector, Town Clerk, three Excise Commissioners, four Constables, and Highway Commissioner. There also were four incorporated villages on the Island at the time of consolidation, namely New Brighton, Edgewater, Port

Richmond and Tottenville. As an incorporated village, each was considered its own local government within the county framework and thus had its own elected board of trustees, health officer, clerk, treasurer and engineer.

13. In the late 1860s, talk began of expanding New York City by consolidation with surrounding areas. The leading advocate at this time was Andrew Greene, a Manhattan official. In 1890, the Legislature created a Commission (composed of persons appointed by the Mayor of New York, the Mayor of Brooklyn and the Board of Supervisors of Richmond, Queens, Kings and Westchester) to examine the possibilities of consolidation. The Commission recommended several bills regarding consolidation to the Legislature, and in 1894 one of those bills became law, providing for nonbinding referendum on the issue, to be voted by the people in the affected area. The result of the vote:

	For	*Against*
New York	96,938	59,959
Kings	64,744	64,467
Queens	7,712	4,741
Richmond	5,631	1,505
Westchester County		
Town of East Chester	374	260
Town of West Chester	620	621
Town of Pelham	251	155
Totals	176,170	131,708

Exhibit A Annexed to the Affidavit of John J. Marchi

14. From a review of the records of these times, particularly newspaper articles, it is clear that during the 1890s, before and after the 1894 referendum up to the consolidation in 1898 there was a great deal of discussion among Richmond county residents concerning the pros and cons of Richmond County entering into this consolidation. Hearings were held by the Commission on Consolidation and by the Legislative Sub-Committee. "The Republican" newspaper (2/5/1896) reports of the final hearing of a Legislative Sub-Committee at which Governor Flower, Andrew Green, and the leading Staten Island proponent of consolidation, George Greenfield were present. Some officials from New York and Brooklyn spoke against including Staten Island in the consolidation. After the anti-consolidationists spoke, a leading Staten Island consolidation advocate, Erastus Wiman addressed the committee, giving arguments not only in behalf of consolidation, but as to the wisdom of including Staten Island. Mr. Wiman stated that the geographical advantages of the waterfront of Staten Island could bring great benefit to the City and could save the City from a decline in its commerce.

15. According to an article from "The Republican," (4/8/1896), at another hearing before New York Mayor Strong, George Greenfield spoke at considerable length on the advantages which would result from consolidation. Greenfield stated that if Staten Island were not part of the consolidation plan, Richmond County will incorporate as a city of the second class, with plans "already being made to prepare ourselves for an independent municipality."

Exhibit A Annexed to the Affidavit of John J. Marchi

16. Indeed, as Mr. Greenfield stated above, there had been plans to pursue the option of Richmond County becoming an independent city. As is reported in "The Republican" (1/18/1896) a Committee on City Charter had previously been formed with George M. Pinny, Jr. as Chairman. The Committee has researched the issue of Richmond County becoming a city, and reported that under the State Constitution the cities of the state were divided into three classes, with the population of Richmond County fitting it into a city of the second class. The Committee also prepared a complete list of all statutes enacted affecting Richmond County, so that it might be prepared "for intelligent action" regarding what form of government the county should adopt. After a review of the work and the current state of the consolidation movement, the City Charter Committee in a report stated that there were two courses opened for consideration for Richmond County—an independent city or consolidation into Greater New York. This report submitted to the Board of Supervisors, recommended that no action be taken on being an independent city, deeming that such action would be "inexpedient . . . at the present time . . . in face of the Greater New York measure."

17. As history reveals, no further action was taken regarding independent city status on Staten Island, with consolidation of Greater New York, becoming effective on January 1, 1898 by the New York State Legislative enactment.

18. I have researched carefully the various contemporary accounts contained in newspapers, histories and related literature concerning the events leading up to and

Exhibit A Annexed to the Affidavit of John J. Marchi

culminating in the establishment of the Greater City of New York in 1898. Nowhere in the records, newspaper reports and various meetings was the question of adequate representation, either on the Board of Estimate or the then Board of Aldermen, now the Council raised. Obviously, Staten Island voters and leaders were satisfied that the Island, small in population as compared to the rest of the proposed boroughs, would be adequately represented.

19. In my opinion, the citizens and officials of Richmond County of the late 1890s would never have chosen to give up their own county form of government or their plans to pursue an independent city form of government if they knew, or even suspected that they or their successors would not have a meaningful voice in the major decisions that affected their county.

20. The consolidation in 1898 brought an end to Staten Island's incorporated villages and county government. The office of the Borough President replaced the Board of Supervisors, with the first Richmond Borough President, George Cromwell appointing the Commissioners of several borough departments to assist him. In the years that followed, through several charter revisions, the powers of the Borough Presidents were decreased substantially with many responsibilities shifted to the Mayor.

21. Staten Island has a large percent of the vacant land in the City of New York and a percentage of population growth far greater than in any of the other four boroughs.

Exhibit A Annexed to the Affidavit of John J. Marchi

In my opinion, in this critical period in our history a decrease in our voting power on the Board of Estimate, which controls the fate of this vacant land would be completely unrealistic and, in addition, would not be consistent with the spirit of those who in 1898 welcomed our admission into the Greater City of New York.

/s/ Loring McMillen
Loring McMillen

Sworn to before me this 13th day of March 1985.

/s/ Patricia E. Perez
Notary Public

Exhibit (B): Annexed to the Affidavit of John J. Marchi

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81 Civ. 3920 (ERN)

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, CAROL BELLAMY, as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, ANDREW STEIN, STANLEY SIMON, DONALD MANES, RALPH LAMBERTI, each individually and as Borough Presidents of the boroughs of the City of New York,

—and—

FRANK V. PONTERIO,

Intervenor-Defendant,

ROBERT A. STRANIERE, individually and as a member of the New York State Assembly,

Intervenor-Defendant.

AFFIDAVIT OF ALBERT V. MANISCALCO

Exhibit B Annexed to the Affidavit of John J. Marchi

STATE OF NEW YORK,
COUNTY OF RICHMOND, SS.:

ALBERT V. MANISCALCO, being duly sworn deposes and states:

1. I was born in New York City in 1907 and have lived in the City of New York my entire life.

2. I currently reside at 188 Major Avenue, Staten Island, N.Y.

3. I have been intimately involved with many phases of New York City and New York State affairs since the 1930's.

4. In 1938 I was elected to the New York State Assembly, representing an Assembly District on Staten Island. I served in the Assembly from 1938 until 1942.

5. From 1948 to 1953, I served as the borough secretary, Borough of Richmond. As borough secretary I was in charge of legislative matters concerning the Borough of Richmond and was designated to sit on the New York City Board of Estimate in the absence of the Borough President, who was then Cornelius Hall.

6. From 1953 to 1954 I was a member of the New York City Council.

7. From 1954 to 1965 I was the Borough President of the Borough of Richmond and in that capacity was a member of the New York City Board of Estimate.

Exhibit B Annexed to the Affidavit of John J. Marchi

8. From 1965 to 1968 I was a legislative consultant to the Speaker of the New York State Assembly, who was Anthony J. Travia.

9. From 1970 to 1972 I was a member of the Staten Island Community School Board.

10. From 1972 to 1975 I was a member of the New York State Charter Revision Commission for New York City.

11. From 1973 to 1984 I was a member of the Staten Island District Board of the Comprehensive Health Planning Agency, that is, the Health Systems Agency of New York City.

12. From 1976 to 1985 I was a member of the New York City Board of Higher Education.

13. The purpose of the New York City Board of Estimate is very different from that of the New York City Council. While the Council acts as the general legislative body of the City, the Board of Estimate functions in those areas concerned with the City's property, franchises and contracts. The Board of Estimate is similar to the board of directors of a large corporation, operating to keep the business of the City running as efficiently as possible.

14. The role of the individual members of the Board of Estimate is similarly quite different from the role of an individual City Council member. Unlike members of the Board of Estimate, a Councilman sits on the Council representing an individual portion of the City. When I served as the City Councilman from Staten Island I was

Exhibit B Annexed to the Affidavit of John J. Marchi

present on the Council representing my Staten Island constituents and doing all possible for what I perceived to be the good of my constituency.

15. By virtue of my being the Richmond Borough President I was a member of the Board of Estimate: with Staten Island's interests being of paramount importance: but my role as a member of the Board was never limited to a Staten Island constituency. I always viewed my role on the Board as a New Yorker sitting as a member of the board of a corporation running the City's business. I often remarked that when I went into the Board of Estimate's meeting I took off my exclusively Mr. Staten Islander hat and put on my Mr. New Yorker from the Borough of Staten Island hat. I believe that this view of the role of the members of the Board of Estimate was shared by the other members of the Board, including the other Borough Presidents, as well as the Mayor, Comptroller and City Council President.

16. To carry the corporate analogy a little further, the vice president for budget of General Motors, for example, might by virtue of his title be a member of the board of directors of General Motors. That vice president spends most of his working hours performing his budgetary functions. However, at Board meetings, he becomes one of a team of directors. Similarly, as Staten Island Borough President I spent most of my time attending to Staten Island matters; however, when I attended those bimonthly Board of Estimate meetings, I was there to deal with City matters and I did so not as merely a local borough president but also as a member of the Board of Estimate for the entire City.

Exhibit B Annexed to the Affidavit of John J. Marchi

17. Although each member of the Board of Estimate is acting for the City as a whole when dealing with matters that come before the Board of Estimate, obviously if a matter dealt with a particular area of expertise of an individual member, the other members would turn to that member for guidance. For example, if a particular use of city land in Queens was a matter on the Board of Estimate calendar while I was on the Board, I would be guided by the opinion and expertise of the Queens Borough President, James Crisona, since he was from that borough and was obviously more familiar with its needs and interests than the other members of the Board. Similarly, if a matter was before the Board which involved land use on Staten Island, the other members of the Board, whether they were borough presidents or city wide officials, would turn to me for counsel and would give my views a great deal of weight. My voice was heard not just because of my local expertise, but because I was a full participant with the ability by my vote to influence the outcome of an issue. If I was not a full participant, but was there without any ability to influence a vote, my ability to effectively sway someone else's vote would have been eliminated.

18. In the many years that I served on the Board of Estimate, I observed many other members of the Board, there by virtue of their position as city wide officials or borough wide officials. How an individual member would vote on a particular matter could not be predicted merely on the basis of the way they obtained board membership. For example, there were numerous times a citywide official would interject himself into a matter that was purely

Exhibit B Annexed to the Affidavit of John J. Marchi

local, that is, affects only one borough. Similarly, if a matter had an exclusive impact on Staten Island I would present the same pitch for support to the Borough Presidents as I would to the Mayor, Comptroller and City Council President.

19. For the first four years that I served on the Board of Estimate (and in the four years that as Borough Secretary I was the Borough President's designated representative on the Board), the votes of each Borough President on the Board were not the same. The Borough Presidents of Manhattan and Brooklyn had two votes each, while the Borough Presidents of Richmond, Queens and the Bronx each had one vote. The Mayor, Comptroller and City Council President each had three votes. This voting structure had been in place since 1900 and had not, in my opinion, served to diminish the role that the Borough Presidents of Richmond, Queens and the Bronx had in the Board's deliberations. With one vote, I and the Borough Presidents of Queens and Bronx could still individually influence the outcome of a close vote. Furthermore, my opinion and expertise on matters relating to my borough was, I believe given the same credence and weight by the other Board members in their deliberations whether I cast one or two votes when the matter was eventually voted upon. Since I was a meaningful participant able to influence the outcome of a vote. If, however, I only had 1/6 of a vote, I would have no meaningful presence and would not have, I believe, been treated as a credible Board member.

Exhibit B Annexed to the Affidavit of John J. Marchi

20. In 1958 the voting structure of the Board of Estimate was changed for the first time since the turn of the century. The change was the result of legislation introduced by Assemblyman J. Lewis Fox of Far Rockaway, Queens.

21. The original bill introduced by Assemblyman Fox amended the voting structure on the Board by changing the vote of the Borough Presidents of Queens and Bronx from one to two, leaving the Richmond Borough President with one vote and the Manhattan and Brooklyn Borough Presidents with two (and the Mayor, Comptroller and City Council President with three votes). *In this original bill, for the first time since the consolidation of New York City, Staten Island would be singled out and treated as a second class member on the Board of Estimate.*

22. Through discussions with the Mayor and the other members of the Board of Estimate, it was agreed that the Fox bill should be amended to include Staten Island, thus giving all the Borough Presidents two votes. The New York City Council agreed with this and sent the necessary home rule message to the State Legislature, which resulted in Chapter 719, Laws of 1958.

23. The reason advanced by those who first supported Assemblyman Fox's bill was that the tremendous change in the population of the outer Boroughs justified those boroughs being given the same vote as the boroughs of Manhattan and Brooklyn. In my opinion, the main reasoning behind the Board of Estimate, the City Council,

Exhibit B Annexed to the Affidavit of John J. Marchi

the State Legislature and the Governor supporting the final version which treated all the Borough Presidents equally was the recognition of the role, functions and workings of the Board of Estimate. The "Board of Directors" of the corporate city of New York had worked together to run the complex business of the City of New York by combining local borough concerns with city wide needs. Even before any change in the voting structure, each director, whether he sat on the Board by virtue of his Borough or City office, had a vital role in the operation of the Board and could influence the outcome of a vote on any issue, whether it involved a city wide or purely local matter. To change the voting structure for all but one member would have been perceived as relegating that member to less than full status and would have undermined his ability to carry out effectively his role. However, even before the change was made in 1958, I and other Borough Presidents who had one vote, were able to act as effective members of the Board. If, however, I or my successors were given only 1/6 pf the vote of the Brooklyn Borough President, our role on the Board would be rendered meaningless and the Board's ability to deal with the entire City would be greatly diminished.

24. Although the membership and voting structure of the Board of Estimate has changed little since the early 1900's the powers that the Borough Presidents possess over the affairs of their Boroughs have dramatically changed since the time of consolidation. The substantive powers of each borough president have been drastically reduced, making the meaningful presence of each Borough President on the Board of Estimate of paramount im-

portance and indeed much more vital than during the years that the Borough President had enormous powers and a significant voice in the running of his borough.

25. The philosophy behind the operation of the Board of Estimate is very similar to other bodies that govern the affairs of the City of New York; for example, the Board of Trustees of the City University (commonly known as the New York City Board of Higher Education) governs and administers all educational units of the City University. By state statute the board of trustees consists of seventeen members—ten appointed by the Governor and five by the Mayor, the two other trustees are ex-officio, being the chair-persons of the City University Student Senate and Faculty Senate. Of the ten Gubernatoral appointments, there must be at least one resident from each of the five boroughs. Of the five appointed by the Mayor, there also must be at least one resident of each borough. I served as one of the five mayoral appointments on the Board from 1976 to 1985.

26. The analogy between the composition of the City University Board of Trustees, with its ten borough appointments and seven city wide appointments and the composition of the Board of Estimate, with its five Borough Presidents and three city wide officials, is obvious. The philosophy behind the two boards is also the same—effectively and fairly operating the business of the city by meeting the needs of the whole entity while meeting the needs of each component of the entity. When I served as a Trustee of the City University, my role was not as a representative of the City University component on Staten

Island, the College of Staten Island, rather, my role was as a Trustee for the entire system, to facilitate meeting the educational needs of the entire city. If a matter came before the Board that impacted upon the College of Staten Island, my opinion would be sought by the other members just as within the Board of Estimate.

27. In my experience those Trustees who were appointed as a city wide appointment acted no differently in carrying out their duties than those who were appointed on the basis of their borough residency. An example that comes to mind is the issue of a City University medical college to be located in Queens. The two present Staten Island members of the Board of Trustees, Margaret Titone and Louis Cenci, took opposite views when the question of such a college came up for a vote—Margaret Titone voted against its creation, stating that it was not in the interest of the City University system, however, Louis Cenci voted in favor of its creation. The fact that Mrs. Titone or Mr. Cenci are from Staten Island and not Queens was irrelevant to their functioning as trustees for the good of the entire City University.

28. The fact that Staten Island has the same number of Borough appointments on the Board of Trustees as the other more populous boroughs has not in my experience, resulted in the educational institutions or the students on Staten Island receiving any more than their proportional fair share and similarly has not resulted in the more populous boroughs receiving less than their proportional fair share.

Exhibit B Annexed to the Affidavit of John J. Marchi

29. This affidavit has shown the collegial nature of the Board of Estimate and the importance of retaining the Board's present composition and voting strength to insure that it can carry out its function of meeting city wide problems while addressing local concerns.

/s/ Albert V. Maniscalco
Albert V. Maniscalco

Sworn to before me this 14th day of March, 1985.

/s/ Patricia E. Perez
Notary Public

Exhibit (C): Annexed to the Affidavit of John J. Marchi

UNITED STATES DISTRICT COURT

Eastern District of New York

81 Civ. 3920 (ERN)

Beverly Morris; Joy Clarke Holmes; Joanne Oplustil,

Plaintiffs,

—against—

The Board of Estimate, The City of New York, Edward I. Koch, individually and as Mayor of New York, Carol Bellamy, as City Council President, Harrison J. Goldin, individually and as Comptroller for the City of New York, Howard Golden, Andrew Stein, Stanley Simon, Donald Manes, Ralph Lamberti, each individually and as Borough Presidents of the boroughs of the City of New York,

—and—

Frank V. Ponterio,

Intervenor-Defendant,

Robert A. Straniere, individually and as a member of the New York State Assembly,

Intervenor-Defendant.

Affidavit of James F. Regan

Exhibit C Annexed to the Affidavit of John J. Marchi

STATE OF NEW YORK,
COUNTY OF RICHMOND, SS.:

JAMES F. REGAN, being duly sworn deposes and states:

1. I reside in Great Kills, Staten Island, New York, and have been a resident of Staten Island since infancy.

2. I have received a Bachelor of Science degree from Fordham University, earned graduate credit in American History and Labor Relations at New York University, earned a Masters degree in Personnel and Guidance from the College of Staten Island and received an honorary Ph.D. from St. John's University. I taught in the New York City public school system for seventeen years as a social studies teacher at two Staten Island high schools, Curtis and New Dorp, where I also served as Dean of Students.

3. Since 1972, I have been a member of the New York City Board of Education, first appointed by Borough President Robert Connor and reappointed by Borough President Anthony Gaeta, both of Staten Island. In 1973, I was elected by my fellow board members to serve as Vice-President of the Board; in 1974-1975, I served as its President. I was again elected President of the Board in 1983 and 1984, and currently hold that position.

4. I have served as Mayor Lindsay's, Mayor Beame's and Mayor Koch's appointee to the New York City Teachers Retirement Board. Since 1978, I have been a member and chairman of the New York State Permanent Commission on Public Employee Pension and Retirement Systems, currently serving in my second five year term.

Exhibit C Annexed to the Affidavit of John J. Marchi

5. Since 1978, I have served as the Board of Education's representative to the Council of Great City Schools, an organization representing the thirty-two largest urban school systems in the United States. I have been elected, and currently serve as a member of the Executive Committee and Board of Directors of the Council of Great City Schools.

6. It is my view that the current composition and voting structure of the New York City Board of Estimate must be maintained, and I submit this affidavit in support of the defendants' position.

7. The New York City Board of Education is similar to the New York City Board of Estimate in its composition (with Borough and City-wide representation) and, in the collegial nature of its deliberations.

8. Pursuant to New York State statute (Education Law § 2590-b), the New York City Board of Education is composed of seven members. The five Borough Presidents each appoint one member and the Mayor appoints two members. Each of the five Borough President appointees must be a resident of the borough from which the Borough President appointing him was elected, while the two "members at large" must only be residents of New York City.

9. The members of the Board annually elect the officers of the Board.

10. The New York City Board of Education has overall responsibility for the entire city school system, which

for the 1984-1985 school year has a student population of over 930,000 students (which by the way is more than the entire population of all but six cities in the United States.) The Board approves recommendations of the Chancellor relating to course and curriculum requirements and allocates through the Chancellor funds to community school boards on the basis of established formulae, Board members meet in special committees during the week and as a Committee of the Whole on each Wednesday. These are working sessions for the formulation of policy for the entire City school district, including the thirty-two decentralized community school districts in the city; the discussion of award of contracts; the receipt and disbursement of funds; personnel matters; issues of collective bargaining; and litigation and appeals, most of which must be acted upon pursuant to State Education Law by the Board at a public meeting. Public calendar meetings are held on the first and third Wednesdays of the month and a public agenda meeting is conducted on the third Wednesday of the month. With as large and diverse a student population and geographic area to serve (unique in many ways within the country), this is not an easy task. That the system runs reasonably well is due to a large part to the make-up of the Board, with each borough's needs and problems being represented and voiced.

11. The State statute also mandates that there shall be a community school board for each community school district whose boundaries are defined by the Board. The Board may alter or readjust district lines only once in every third year, following the criteria enumerated in the state law. These criteria include the common and special

educational needs of the Communities, the suitability of the size of the district for efficient policy making and geographic contiguity, with a specific mandate that the boundaries of any district not cross county lines (with the exception of District 10 in the Bronx, which has historically included a little portion of Manhattan).

12. The Board of Education is charged with the responsibility for the entire city district of close to one million students, with diverse needs and backgrounds. This task would be impossible to perform with any degree of success without each borough's needs and concerns having a meaningful voice. For example, the educational needs and school transportation needs of students in Travis, Staten Island are often different from those of the students in Bedford-Stuyvesant, Brooklyn. Since Board decisions impact upon all students and teachers within the entire city district, the Board must make those decisions with the knowledge and understanding of the needs of all the borough's educational communities.

13. While kindergarten through Junior High School programs are implemented by community school districts, there are certain schools and programs where the City Board, after reviewing district and city-wide needs, establishes programs which are open to all city students regardless of residency (generally a student's school is determined by his residency). For example, there are schools in the city school district that are established to meet special educational needs of pupils and are open to all city students on the basis of criteria (For example Bronx High School of Science, Stuyvesant High School (which

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this year had two Westinghouse Science Award winners out of forty nationally) and LaGuardia High School of Music and the Arts based on competitive testing; vocational and technical high schools based on aptitude tests; and city-wide programs such as attendance improvement and drug prevention based on need).

14. In my thirteen years on the Board, I have worked with many "borough appointees" and "at large appointees," and have noticed no pattern which differentiates the two groups when it comes to Board deliberations. Merely because a member is appointed "at large" has not restricted that member from concerning himself (some more forcefully than others) in a matter that involves only one borough, or one school within that borough. Understandably, if a significant borough matter is being considered, the member from that borough as well as any member who lives in that borough are usually the most informed and vocal and take the lead. For example, through the late 1970s and early 1980s a project that has been of great importance to me was the construction of a new New Dorp High School on Staten Island. In gaining the support of fellow Board members for that project, whether the member was a borough appointee from the Bronx or an "at large" appointee who resided in another borough was irrelevant to his or her listening to the merits and deciding if it were best for the City school district as a whole.

15. The fact that a member is a borough rather than an "at large" appointee is not a significant factor in my being able to persuade him or her to vote on the merits

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of a certain issue; however the fact that I, as a borough appointee from Staten Island have a full vote and thus a meaningful presence on the Board is a significant factor. If I had only a fraction of the vote of the members from other boroughs, I could not be a full participant and would have little influence in the matter.

16. Although Staten Island, the smallest borough, has the same vote on the Board as each of the other boroughs, it is important to note that this has never resulted in Staten Island receiving more than its proportional share of the educational dollar. Nor to my knowledge has any other borough received more or less than its fair share.

17. The New York City school district is different in many respects from other school districts in the county and the Staten Island community school district is different from other districts in the City. The racial mix of the student population is different, transportation needs are different (Staten Island has a much greater percentage of students walking or using automobiles to get to schools —students parking is a problem to be faced in Staten Island but not to the same extent in other boroughs); reading scores are proportionately higher, and the Regents Scholarship scores are proportionately higher.

18. The Staten Island district is different from the rest of the city district because Staten Island is different from other boroughs. Although Staten Island is the fastest growing borough (gaining in population while the rest of the City is losing population) and indeed the fastest growing county in the State, it is still a suburban community

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with a very real sense of community. This sense of community is illustrated by the fact that although Staten Island has a large enough student population (over 30,000) to separate into two districts (and thus be eligible for a separte district office with additional administrative expenses of approximately $400,000 to $500,000 annually), the district has purposely remained as one. On Staten Island, the district is considered the entire region, the whole borough, the educational community. The entire Staten Island community is united in its belief that remaining as one unified district is in the best interests of our children and our community.

/s/ James F. Regan
James F. Regan

Sworn to before me this 15th day of March, 1985.

/s/ Patricia E. Perez
Notary Public

Exhibit (D): Annexed to the Affidavit of John J. Marchi

UNITED STATES DISTRICT COURT

Eastern District of New York

81 Civ. 3920 (ERN)

Beverly Morris; Joy Clarke Holmes; Joanne Oplustil,

Plaintiffs,

—against—

The Board of Estimate, The City of New York, Edward I. Koch, individually and as Mayor of New York, Carol Bellamy, as City Council President, Harrison J. Goldin, individually and as Comptroller for the City of New York, Howard Golden, Andrew Stein, Stanley Simon, Donald Manes, Ralph Lamberti, each individually and as Borough Presidents of the boroughs of the City of New York,

—and—

Frank V. Ponterio,

Intervenor-Defendant,

Robert A. Straniere, individually and as a member of the New York State Assembly,

Intervenor-Defendant.

Affidavit of Les Trautmann

Exhibit D Annexed to the Affidavit of John J. Marchi

STATE OF NEW YORK,
COUNTY OF RICHMOND, ss.:

LES TRAUTMANN, being duly sworn deposes and states:

1. I reside at 101 Highland Avenue, Staten Island, New York and have lived on Staten Island for most of my life.

2. I obtained a Bachelor of Arts degree in English from Wagner College, a Master of Science Degree in Journalism from Columbia and an honorary Doctor of Human Letters degree from St. Johns University.

3. I have been involved in the newspaper business since 1938, when I worked as a correspondent for various New York Metropolitan area newspapers. Since that time, I have worked exclusively for various newspapers, with the exception of the four years that I was in military service. For two of the years I was in the U.S. Army, I was assigned to the Southwest Pacific where I founded seven different Army publications including the 100,000 circulation Daily Pacifican. Since 1965, I have served as Editor-in-Chief of the *Staten Island Advance,* a Newhouse publication.

4. In addition to my duties at the newspaper, I hosted for two years a WNYC-TV show entitled "Staten Island Today."

5. Over the years I have been involved with numerous community organizations and am currently a member of the Wagner College Board of Trustees, a member and secretary of the Bayley Seton Hospital Board of Trustees

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and a member and vice-president of the Staten Island Family Services Board of Directory.

6. I am a member of numerous professional groups, including the American Society of Newspaper Editors, the New York State Society of Newspaper Editors and the Associated Press Managing Editors Society and I am listed in *Who's Who in America, Who's Who in Commerce and Industry* and the Dictionary of International Biography.

7. I submit this affidavit in support of the position that the Board of Estimate's current voting structure is not only justified but of grave importance to assuring that the needs and concerns of all the boroughs are effectively met. This justification, particularly as it relates to Staten Island can be seen through the history of the consolidation of Staten Island into New York City, as well as through the numerous indicia that Staten Island is a community which is distinct from the rest of the City.

8. Richmond County is comprised entirely of Staten Island and was one of the original twelve counties of New York State, established as a county in 1683.

9. Staten Island's relations with New York City date back more than a century. In the mid-1860s, New York City established metropolitan police, sanitary and health districts that encompassed Richmond County (Staten Island), but these were abolished in 1870.

10. In the 1880s, a movement grew to consolidate New York, Brooklyn and surrounding territories. According to

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papers in the Staten Island Historical Society, Staten Island at that time was divided into four towns—Northfield, Southfield and Westfield, three divisions dating Colonial days and Middletown, which was organized in 1860. The county also included several villages, New Brighton, Edgewater and Port Richmond, which were incorporated in 1866, and Tottenville, which was incorporated in 1894. All towns and villages had elected officials.

11. These historical papers show that the consolidation move on Staten Island was supported by the property owners who argued that the Island could supply the city with port facilities, cheap land for manufacturing centers and housing for working people.

12. The move toward consolidation, historical papers show, gained ground when one George J. Greenfield was appointed by the Richmond County Board of Supervisors to represent Staten Island on the Municipal Consolidation Committee.

13. The issue was put to a vote in 1894. Historical papers show that voters complained of poor roads, inadequate sewers, taxes that didn't raise enough money; they indicated voters wanted more schools and better police and fire protection.

14. Whereas the vote was in favor of consolidation in Brooklyn by only 277 votes, Staten Islanders favored it by a vote of 5,531 to 1,505.

15. Consolidation became a reality on January 1, 1898.

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16. The Staten Island of today, just as the Staten Island of the 1890s is an anomaly, a suburban borough in sharp contrast to the other four urbanized boroughs of New York City.

17. This uniqueness of Staten Island is sustained beyond the visitor's perception and is borne out by the demographics. There is a special homogenity in the way of life. Almost everything about Staten Island is sharply different from the rest of the city.

18. As a striking example, it has the only remaining daily community-oriented newspaper left in New York City. *The Staten Island Advance* publishes seven days a week, with emphasis on local news, and outsells by a considerable margin the combined sales of the *New York Times*, the *Daily News* and the *Post* on Staten Island. Four surveys by Belden Associates of Dallas, Texas, show that nine out of ten adults in this borough read it daily, or 240,000 readers 18 years of age or older.

19. The studies and the surveys indicate that this uniqueness of Staten Island is its very peril if it were to have less than an equal voice on the city's Board of Estimate. Under the present Board, Staten Island is able to obtain as high as seven percent of the municipal budget for infrastructure—vitally needed for a burgeoning county, the fastest growing in the state. This is needed, for example, because most of Staten Island still lacks sanitary sewers.

20. Staten Islanders rely mostly on automobiles. It has no subways and its municipal bus system is mediocre.

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Other than taking a roundabout route by car through New Jersey, the Staten Island physical connections with the rest of the city are restricted to a five-mile municipal ferry ride or a drive (no pedestrians) over the two-mile Verrazano-Narrows Bridge.

21. One of the major roles of the Board of Estimate is the determination of land use. This is vital in the future of Staten Island, which is still an estimated ten years from being "built out," or all available acreage used. Thus, the Board's land-use power is of enormous importance.

22. Even with an "equal voice" on the Board of Estimate, Staten Island has had a most difficult time in gaining the infrastructure it needs for a sharply increasing population, a rare trend within New York City, and in fighting off undesirable projects. Most of Staten Island, for example, still lacks municipal sanitary and storm sewers. Septic tanks overflow in the streets; many streets are impassable when it rains because there is no arranged runoff. The world's largest "landfill" (garbage dump) is projected by the Sanitation Department to reach a height of 500 feet with 15 years on the Island's West Shore. The highest natural elevation on Staten Island (Todt Hill in the center of the Island) is 410 feet. Mid-rise apartment projects have been erected in some of the older sections to dwarf older residences and throw the racial mix far out of balance. Most Island streets have not been taken over officially by the city and thus remain thinly and inadequately surfaced. One can imagine the horrors if the Island had no meaningful voice on the Board of Estimate.

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23. The strikingly suburban characteristics of the Borough of Staten Island are demonstrated in the survey made by Belden Associates of Dallas, Texas, in October and November, 1984, and commissioned by the Staten Island Advance. These statistics are for the total market according to Belden, and not just for Advance readership. Belden allows up to a 3 percent margin of error:

a. These people are 91 percent white.

b. 29 percent are college graduates, 15 percent have part-college and 43 percent are high school graduates.

c. 19 percent have one child, 19 percent have two children, and 9 percent have three or more.

d. 53 percent have incomes above $30,000, another 15 percent have income between $20,000 and $29,999. Only 6 percent are below $10,000.

e. 32 percent of the chief wage earners work in Staten Island, 26 percent in Manhattan, 10 percent in Brooklyn, 5 percent in New Jersey. (Richmond County is, I believe, the only county in New York State in which a significant portion of its residents leave the state to work).

f. 61 percent live in one-family homes, 30 percent in two-family homes, and 9 percent in apartments, condos or co-ops. This is in sharp contrast to the other boroughs. While Belden Associates reports 75 percent of Staten Islanders own their own home, the city Housing Preservation and Development Department reports these figures for the other boroughs: Queens, 37 percent owner-occupied; Brooklyn, 22 percent owner-occupied; the Bronx, 14

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percent owner-occupied, and Manhattan, 9 percent owner-occupied.

g. The marital figures for Staten Islanders are: 69 percent married, 7 percent widowed, 6 percent separated or divorced and 17 percent single, never married.

h. 46 percent of the women work.

24. These statistics already show the disparities between the style, social climate and needs of Staten Island in contrast to the other four more urban boroughs and why Staten Island's special interests and development would be submerged or ignored were the Board of Estimate weighted in terms of population only.

25. In my opinion Staten Island cannot count on politics, the ballot box, to redress wrongs or to seek the right.

26. Like the rest of the city, Staten Island is overwhelmingly Democratic in registration. Unlike the rest of the city, Staten Islanders are notorious ticket-splitters despite 87,000 registered Democrats and 43,000 registered Republicans.

27. The Republicans have a congressman, a state senator and an assemblyman (until this year the only Republican Assemblyman in New York City). The Democrats control two Assembly seats, the two City Council seats, the borough presidency and the district attorney's office.

28. From these election figures, one can easily discern why the ruling party, the Democrats, in the City will rarely

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court or show intense interest in the Staten Island electorate:

a. In the 1984 presidential election, Ronald Reagan captured 66 percent of the vote on Staten Island and Walter Mondale received 34 percent. The percentages—all for Mondale—in the other four boroughs were: Manhattan, 72; the Bronx, 68; Brooklyn, 62, and Queens, 53.

b. In the 1982 gubernatorial election, Democrat Mario Cuomo carried Staten Island with a fraction of a point more than 50 percent over Lew Lehrman, the Republican. The pro-Cuomo voting elsewhere in the city was the Bronx, 72 percent; Brooklyn, 67 percent; Queens, 60 percent; Manhattan, 74 percent.

c. In the 1981 mayoral election, the disparity was not so great. In fact, Edward I. Koch ran better on Staten Island than he did in the rest of the city, 79 percent against 72 percent. The party breakdown reveals more. On Staten Island, Koch, the Democrat, received 54 percent and Koch, the Republican, drew 24 percent. In contrast, the citywide figures for Koch, the Democrat were 58 percent and Koch, the Republican, only 14 percent.

d. The ticket-splitting characteristic is typified by the 1984 election. Ronald Reagan took 66 percent of the vote, while Republican Rep. Guy Molinari took 70 percent. A Republican assemblyman won 77 percent, but a Democratic assemblywoman won 58 percent and a Democratic assemblyman won 60 percent.

29. Two conclusions should be obvious from the above election results—one that Staten Island rarely enjoys any

political clout and, perhaps more significantly, that the voters of this county vote for their perceptions of what or who is good for their community, regardless of party affiliation.

30. Staten Island is largely service-oriented with private sector employment concentrated in the medical field and in education (including three colleges). There is only one industry of any significance, Proctor and Gamble situated on the northwest shore; the second largest is a container-ship operation.

31. Staten Island was hailed for years as "the last frontier" of the city because of its undeveloped acreage. The last 15 years have seen extensive home construction with planners now asserting, that Staten Island may be "built-out" within a decade. How the Board of Estimate deals with this vast undeveloped land in the next ten years will irrevocably determine the character of this county.

32. It is this land-use perogative of the Board of Estimate that leads to extensive debate and often disgruntlement within the populace. Hi-rise construction is generally viewed with distaste and disdain and since, according to a recent housing survey, Staten Island has the highest apartment vacancy rate in the City, it is arguably not the type of land use that should be approved by the Board for the Borough.

33. These land-use subjects are among the leading ones covered by the Staten Island Advance.

34. The Advance, not so coincidentally, also focuses on something else, which shows a particular Staten Island aspect. While other boroughs have leftover community designations, such as Park Slope and Bay Ridge in Brooklyn, these designations still retain high importance in Staten Island. Only recently have the boundary lines become somewhat blurred in some instances, but there is great community insistence, with civic group activity, in these "town" designations, such as St. George, Tottenville, New Dorp, Great Kills and many others. They come up repeatedly in land-use discussions and planning. Despite these town designations, residents still think of themselves as "Islanders."

35. The Advance, significantly, deals heavily with homes and gardens, local educational opportunities, the development of local cultural institutions and, on a much broader basis, the preservation of trees and park areas. The most outstanding of the latter is the preservation of a 2,000 acre "Greenbelt," running East to West across the center of the Island which after twenty years of negotiations is now only being determined by statute.

36. According to the 1980 census, New York City, with its approximately 7,000,000 people, has a larger population than any other city in the United States and is larger than 41 states. The census also indicates that there are only six cities in the U.S. with a larger population than each of the four largest N.Y.C. boroughs. If the smallest borough, Staten Island, was a separate city, it would be the 41st largest city in the United States, larger than, for example, Miami, Florida; Austin, Texas; Denver, Colo-

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rado; Norfolk, Virginia; Providence, Rhode Island; Richmond, Virginia.

37. New York City is unique and Staten Island is, as this Affidavit has shown, unique within New York City. Staten Island must maintain its full vote and meaningful presence in the Board of Estimate to maintain its current suburban character.

/s/ Les Trautmann
Les Trautmann

Sworn to before me this 12th day of March, 1985.

/s/ George E. (Illegible)
Notary Public

Exhibit (E): Annexed to the Affidavit of John J. Marchi

UNITED STATES DISTRICT COURT

Eastern District of New York

81 Civ. 3920 (ERN)

Beverly Morris; Joy Clarke Holmes; Joanne Oplustil,

Plaintiffs,

—against—

The Board of Estimate, The City of New York, Edward I. Koch, individually and as Mayor of New York, Carol Bellamy, individually and as City Council President, Harrison J. Goldin, individually and as Comptroller for the City of New York, Howard Golden, Andrew Stein, Stanley Simon, Donald Manes, Anthony Gaeta, each individually and as Borough Presidents of the boroughs of the City of New York,

—and—

Frank V. Ponterio,

Intervenor-Defendant,

Robert A. Straniere, individually and as a member of the New York State Assembly,

Intervenor-Defendant.

Affidavit of David Jaffe

Exhibit E Annexed to the Affidavit of John J. Marchi

STATE OF NEW YORK,
COUNTY OF RICHMOND, ss.:

DAVID JAFFE, being duly sworn deposes and says:

1. He is an attorney at law and a member of the law firm Marchi Jaffe Cohen Crystal Rosner & Katz located at Two Wall Street, New York, New York 10005 and at 358 St. Marks Place, Staten Island, New York 10301.

2. He resides in New York County (Manhattan) and has resided in that County for over 20 years.

3. He has resided in New York City all his life except for service in the United States Navy during World War II and while attending college.

4. This affidavit is submitted to that area of the Second Circuit Court of Appeals decision which directed the District Court to "rule on the policies and interests which the Supreme Court has held *may justify deviations* from the literal one person one vote formula" in conjunction with the Court in footnote 3 noting "the fact that three members of the Board are elected at large from the entire city raises *novel issues* as to how an individual voter's opportunity to elect these members should be assessed in conjunction with his opportunity to elect his borough representative." (Emphasis added)

5. Your deponent asks this Court to take Judicial Notice of the volumes of statistical data (including census materials) official reports of Federal, state and local governments, foundation reports, scholarly publication and

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media reports which clearly demonstrate that New York City is different from any other governmental entity in the United States and is recognized as the *"Big Apple"* and is the magnet and mecca for people throughout the world. The following information is submitted upon information and belief.

(a) New York City's present population is approximately 7,000,000 people. It is larger than any other city in the United States and is larger than 41 states. The four largest New York City boroughs individually would rank higher in population than all but six United States cities. The Borough of Staten Island, the smallest of the five boroughs, if it were a separate city, would rank as the 41st largest city in the United States, larger than, for example, Miami, Florida; Austin, Texas; Denver, Colorado; Norfolk, Virginia; Providence, Rhode Island; and Richmond, Virginia. (*The World Almanac and Book of Facts* 1985).

(b) The budget of New York City, $17.2 billion in 1984, is bigger than the budgets of 48 states and is bigger than the budget of numerous countries, including Argentina; Columbia; Denmark; Greece; Hungary; India; Ireland; South Korea; Norway; Pakistan; Peru; Portugal; Switzerland; Thailand and Turkey.

6. The following information is set forth on information and belief. (The source of the information and belief is the 1980 Census, documents obtained from the City of New York, and the Legislative Institute, newspaper articles and various other documents.)

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(a) The Statue of Liberty standing in New York Harbor has been a symbol of New York City and the United States since it was constructed in 1886. It has been a beacon of light and a ray of hope for all the people of the world. On the Statue Emma Lazarus' immortal words appear:

> "Give me your tired, your poor, your huddled masses yearning to free, wretched refuse of your teeming shore, send these, the homeless, tempest—tossed to me. I lift my lamp beside the golden door."

New York City has in fact been the Golden Door and received these masses of people as well as some of the wealthiest people in the world.

(b) In the 1980 Census, 733,325 classified themselves as other than U.S. Citizens, i.e. aliens. In the same year the number of aliens registered with the Immigration and Naturalization Service was 603,000, which is estimated to be 75% of the statewide total. It is estimated that an additional 500,000 illegal aliens resided in New York City in 1980 but neither registered with the INS nor respond to the Census. (This figure is considered speculative; *see* letter from New York City Department of City Planning to your deponent dated March 7, 1985, annexed as Exhibit 1; see also, *N.Y. Times* story dated 1/24/85.) It appears that at this time there is a minimum of 1,100,000 to 1,233,325 aliens residing in New York City.

(c) New York City has an estimated 85% of the State's homeless population; 66% of the State's welfare population and 62% of the State's Medicaid re-

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cipients. (Office of the Mayor, *Perspectives on the New York City Budget and the Roles of its Fiscal Partners—The State and Federal Governments* at 7, February 1985).

(d) In 1982 one out of every four recipients fell below the federal poverty level as compared to one out of eleven in the rest of the State. While New York City's population has declined by 823,000 (10.4%) from 1970-1980 the number of residents below the federal poverty level increased by 227,000. (*id.*)

(e) New York City levies 13 taxes which are not levied anywhere else in the State including personal income tax. (The city of Yonkers is now in the process of levying a personal income tax.) (*id.* at 4)

(f) The combined Federal, state and local income taxes paid by *families* (husband and wife) in New York City earning $50,000 exceeds those paid by similar families in other cities. This is also true of *families* in other income levels. Additional taxes paid by New York City families compared to "Middle Atlantic City" is $1,820 more and in "New England City" is $2,114 more. (*id.*)

(g) For New York City *families* earning $100,000 the comparable figures paid over "Middle Atlantic City" is $3,440 and "New England City" is $4,937. (*id.*)

(h) If the federal tax deduction of state and local tax is passed as presently proposed by the Federal Administration, New York City residents' taxes relative to other localities as referred to above would be

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even higher. As an example, a family earning $50,000 residing in New York City would pay $2,692 more than a "Mid Atlantic City" and $3,131 more than a "New England City"; and for a *family* earning $100,000 residing in New York City would pay $5,889 more than the "Middle Atlantic City" and $8,469 more than a "New England City." (*id.*)

(i) A comparison of the 1970 and 1980 Census reveal there was a population loss of over 823,000 persons from New York City in that decade. Among the five boroughs, Staten Island is the only one which gained population, with a 19% increase. The City's white nonhispanic population declined from 4,972,509 to 3,668,845, a loss of 1,303,564 or 26%. (City Planning Commission, *Capital Needs and Priorities for the City of New York* at 11, March 1983)

The 1980 distribution of population of New York City is as follows:

POPULATION CHARACTERISTICS—NEW YORK CITY
1980 CENSUS STF2—SELECTED FULL COUNT DATA

	No.	%
Total Population	7071639	100.000
White Nonhispanic	3668945	51.880
Black Nonhispanic	1694127	23.950
Hispanic Origin or Descent	1406024	19.880
Asian, Pacific Islanders Nonhisp	225862	3.190
American Indian Nonhispanic	8583	0.120
Other Nonhispanic(1)	68098	0.960

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By County:

POPULATION CHARACTERISTICS—THE BRONX
1980 CENSUS STF2—SELECTED FULL COUNT DATA

	No.	%
Total Population	1168972	100.000
White Nonhispanic	396836	33.940
Black Nonhispanic	348744	29.830
Hispanic Origin or Descent	396353	33.900
Asian, Pacific Islander Nonhisp	14468	1.230
American Indian Nonhispanic	1664	0.140
Other Nonhispanic(1)	10907	0.930

POPULATION CHARACTERISTICS—BROOKLYN
1980 CENSUS STF2—SELECTED FULL COUNT DATA

	No.	%
Total Population	2230936	100.000
White Nonhispanic	1085233	48.640
Black Nonhispanic	689626	30.910
Hispanic Origin or Descent	392118	17.570
Asian, Pacific Islander Nonhisp	41793	1.870
American Indian Nonhispanic	2431	0.100
Other Nonhispanic(1)	19735	0.880

POPULATION CHARACTERISTICS—MANHATTAN
1980 CENSUS STF2—SELECTED FULL COUNT DATA

	No.	%
Total Population	1428285	100.000
White Nonhispanic	713854	49.970
Black Nonhispanic	290218	20.310
Hispanic Origin or Descent	336247	23.540
Asian, Pacific Islander Nonhisp	71242	4.980
American Indian Nonhispanic	1917	0.130
Other Nonhispanic(1)	14807	1.030

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POPULATION CHARACTERISTICS—QUEENS
1980 CENSUS STF2—SELECTED FULL COUNT DATA

	No.	%
Total Population	1891325	100.000
White Nonhispanic	1172511	61.990
Black Nonhispanic	341059	18.030
Hispanic Origin or Descent	262422	13.870
Asian, Pacific Islander Nonhisp	91892	4.850
American Indian Nonhispanic	1118	0.110
Other Nonhispanic(1)	12113	1.120

POPULATION CHARACTERISTICS—STATEN ISLAND
1980 CENSUS STF2—SELECTED FULL COUNT DATA

	No.	%
Total Population	352121	100.000
White Nonhispanic	300511	85.340
Black Nonhispanic	24480	6.950
Hispanic Origin or Descent	18884	5.360
Asian, Pacific Islander Nonhisp	6467	1.830
American Indian Nonhispanic	343	0.090
Other Nonhispanic(1)	1436	0.400

(j) The Black population is approximately 25.2% of the total population. (*id.*)

(k) The Hispanic population is approximately 20% (19.9) of the total population. (*id.*)

(l) While the overall population of New York City declined by over 10% from 1970-1980 Richmond County's population increased by over 19%. (*id.*)

Exhibit E Annexed to the Affidavit of John J. Marchi

(m) New York City had 2,784,524 registered voters in 1960; 3,027,714 in 1970 which declined to 2,237,190 in 1980, a net loss of 790,524 voters or 26.1% since 1970. Richmond County had 72,424 registered voters in 1960 and had 112,755 in 1980 or a net gain of 40,331 voters or 54.9%. (Exhibit 2, Prepared by Legislative Institute)

7. The following is based upon deponent's recollection of events. In 1953 the Democratic Party selected a white male as their candidate for Borough President of Manhattan. The Liberal party followed suit and selected a white male candidate for that office. The Republican party nominated a Black male for Borough President of Manhattan. The Democratic and Liberal Parties then nominated Black male candidates for Borough President. As a result Manhattan (New York County) elected the first minority (Black) Borough President in 1953. Bronx County elected a minority (Hispanic) Borough President in 1965. During his first years in office the first Black Borough President of Manhattan had more voting power on the Board of Estimate than the Borough Presidents of Staten Island, Queens and the Bronx. Subsequently, the minority Borough Presidents of Manhattan and Bronx were replaced by white Borough Presidents. The other three boroughs have never elected a minority Borough President.

8. Howard Golden is the present Borough President of Brooklyn (Kings) and its Democratic County Chairman. It appears he is a candidate for reelection.

Exhibit E Annexed to the Affidavit of John J. Marchi

9. Donald Manes is the present Borough President of Queens and its Democratic County Chairman. It appears he is a candidate for reelection.

10. A minority (Black) candidate who is a county wide official has declared for Borough President of New York County (Manhattan) and upon information and belief is deemed to be the favorite to win that office. In addition, upon information and belief based on media reports, a minority (Hispanic) candidate will declare his candidacy for Borough President of the Bronx.

11. Upon information and belief if either or both of the minority candidates for Borough President of Manhattan or the Bronx is successful and the Plaintiffs' position is sustained minority representation, which has been absent from the Board of Estimate for years, will be sharply reduced in power, effect, reality and perception because the voting power of the Borough of Manhattan and the Bronx will be substantially reduced due to the population differential between Brooklyn and Queens.

12. Upon information and belief, the revenues generated by Manhattan and Staten Island support the rest of the City, with Manhattan a large net revenue *producer*, Staten Island a moderate net revenue *producer*, Queens a moderate net revenue *loser*, and both Brooklyn and Bronx large net revenues *losers*.

13. Upon information and belief if the Plaintiffs' position is sustained the political balance of the Board of Estimate will shift from equality among the Boroughs to a

Exhibit E Annexed to the Affidavit of John J. Marchi

Board that is strongly weighted in favor of Brooklyn and Queens. This will change not only the whole political complexion of City government but will change the whole future economic development of the City, the metropolitan area and the region.

14. In thinking about the possible effect on the City of New York of changing the voting structure and composition of the Board of Estimate, your deponent is reminded of H.G. Wells' statement on the decline of the Roman Empire: "The essence of its failure was that it could not sustain unity . . ." [*The Outline of History*, Vol. 1, Chap. 26 at 399, (1920)].

15. The information set forth in this affidavit and others submitted in support of the *Amicus'* position not only shows the novel aspects of the City of New York but that it is *sui generis* and why the present governance of the City including the present makeup of the City Board of Estimate should be kept.

/s/ David Jaffe
David Jaffe

Sworn to before me this 13th day of March, 1985.

/s/ James P. Donohue, Jr.
Notary Public

Affirmation of Susan R. Rosenberg, Read in Further Support of the Defendants' Position dated March 15, 1985

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81 Civ. 3920 (ERN)

BEVERLY MORRIS, et al.,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE, et al.,

Defendants.

—and—

FRANK V. PONTERIO,

Intervenor-Defendant,

—and—

ROBERT A. STRANIERE, etc.,

Intervenor-Defendant.

ATTORNEY'S AFFIRMATION

SUSAN R. ROSENBERG, an attorney duly admitted to practice in the courts of this State, affirms to the truth of the following under penalty of perjury:

1. I am an Assistant Corporation Counsel in the office of Frederick A. O. Schwarz, Jr., Corporation Counsel of the City of New York, attorney for defendants (other than intervenor-defendants). I am fully familiar with the

facts and circumstances of this action and make this affirmation in further support of defendants' position herein.

2. On August 21, 1984, this Court issued a memorandum and order in which the Court excluded from its computation of malapportionment on the Board of Estimate the presence of the three citywide members of the Board. Based upon an examination of the respective populations of each of the five boroughs, the Court found that there exists on the Board of Estimate a 132.9% maximum deviation from population equality.

3. As the Court is aware, defendants continue to respectfully disagree with the Court's determination to exclude the presence of the three citywide members of the Board in determining whether the Board is malapportioned, and if so, to what degree. Moreover, while the Second Circuit remanded this case to this Court to determine, *inter alia,* "the weight of the state interests alleged to justify whatever level of deviation exists," the Court of Appeals additionally directed this Court to consider "whether the combination of at-large and local seats, in the context of the voting procedures of the Board, creates a system of representation that satisfies constitutional standards for instruments of local government." *Morris* v. *Board of Estimate,* 707 F. 2d 686, 690 (2d Cir. 1983). As to the latter question, we have previously set forth the reasons why we believe that the Board's voting structure and composition is constitutionally acceptable. As we pointed out in our Memorandum of Law dated October 26, 1983, (pp. 15-16, 29-32), the voting structure and voting patterns of the Board compel the conclusion that

no borough representative has a disproportionate share of power on the Board.

4. Defendants nonetheless recognize that under this Court's order of February 13, 1985, it is incumbent upon them to present sufficient reasons which would justify the existence of a 132.9% maximum deviation from population equality on the Board. We have previously provided our reasons why we believe that number is justified, (see Joint Stipulation of Policies and Interests served by the Board of Estimate, dated October 18, 1984) and note that while plaintiffs may disagree with them, they are not in disagreement with the facts. In addition, annexed hereto is an affidavit submitted by the Hon. Edward I. Koch, Mayor of the City of New York, and an affidavit submitted by the Hon. Ralph Lamberti, Borough President of Staten Island. Because it is clear that remodeling the Board's voting structure in order to comply with one person, one vote would have a devastating impact upon the citizenry of Staten Island, virtually eviscerating that borough's representation on the Board, Borough President Lamberti in his affidavit sets forth the reasons why, particularly from Staten Island's perspective, the 132.9% deviation is justifiable.

Dated: New York, New York
March 15, 1985

/s/ SUSAN R. ROSENBERG
Susan R. Rosenberg
Assistant Corporation Counsel

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

SUSAN R. ROSENBERG, being duly sworn, says that on the 22nd of March, 1985, she served the annexed Affirmation of Susan R. Rosenberg, Affidavit of Edward I. Koch and Affidavit of Ralph J. Lamberti upon the attorneys for the respective parties as listed below, by depositing a copy of the same, enclosed in a postpaid wrapper in a post office box in the Borough of Manhattan, City of New York.

Richard Emery, Esq.
Attorney for Plaintiffs
New York Civil Liberties Union
132 West 43rd Street
New York, New York 10036

Frank V. Ponterio, Esq.
Intervenor-defendant *pro se*
766 Pelton Avenue
Staten Island, New York 10310

Hon. Robert A. Straniere
Intervenor-defendant *pro se*
182 Rose Avenue
Staten Island, New York 10306

Hon. John Marchi
Amicus Curiae
358 St. Mark's Place
Staten Island, New York 10301

Affirmation of Susan R. Rosenberg

Alan Rothstein, Esq.
Amicus Curiae
Citizens Union
198 Broadway
New York, New York 10038

/s/ Susan R. Rosenberg
Susan R. Rosenberg

Sworn to before me this 22nd day of March, 1985.

/s/ Norma Kerlin

Annexed to the Affirmation of Susan R. Rosenberg
Affidavit of Edward I. Koch

UNITED STATES DISTRICT COURT

Eastern District of New York

81 Civ. 3290 (ERN)

Beverly Morris, et al.,

Plaintiffs,

—against—

The Board of Estimate, et al.,

Defendants.

Affidavit of Edward I. Koch

State of New York,
County of New York, ss.:

Edward I. Koch, being duly sworn, deposes and says:

1. I am the Mayor of the City of New York and have served as such since 1978. I also serve as one of the three citywide members of the Board of Estimate. I am familiar with the facts and circumstances of this action and submit this affidavit in support of defendants' position in this case.

2. I continue to agree with defendants' contention that the amalgam of Citywide and borough representation on the Board is constitutional, and that this Court erred in not taking into account the presence of the three citywide members of the Board and considered instead only the

populations of the five boroughs in determining whether the Board is constitutionally structured.

3. There can be no doubt that the Board of Estimate is, as presently constituted, an important and useful part of New York City's government. As has been previously pointed out many times in this case, the Board operates very effectively in carrying out its functions in helping to govern this complex city. Indeed, in the mid-1970's, the Board struggled with—but weathered—the most serious fiscal crisis with which any major American city has had to grapple in modern history.

4. Moreover, during the time in which I have had the honor and pleasure of serving as Mayor, my office has never received a complaint (other than that in this case) that the citizenry of any borough or community has felt disenfranchised or underrepresented as a consequence of the Board's structure and composition. I attribute this to not only the presence of the three citywide members of the Board, but also to the sensitivity of all the Board members to maintaining a sense of perspective and fairness in voting upon matters considered by the Board. Although this Court has opted to separate the citywide and borough members of the Board in determining the degree of malapportionment present, the Board does not operate under such a two-tier system.

5. Rather than cause turmoil and foment dissension in a City that has been consolidated for nearly a century, and rather than promoting divisiveness among its five

borough members, I respectfully request that the Court treat the Board as it would a still ticking, old and treasured timepiece, and leave its inner workings undisturbed.

/s/ EDWARD I. KOCH
Edward I. Koch

Sworn to before me this 20th day of March, 1985.

/s/ SUSAN R. ROSENBERG
Notary Public

Annexed to the Affirmation of Susan R. Rosenberg
Affidavit of Ralph J. Lamberti

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81 Civ. 3290 (ERN)

BEVERLY MORRIS, et al.,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE, et al.,

Defendants.

AFFIDAVIT OF RALPH J. LAMBERTI

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

RALPH J. LAMBERTI, being duly sworn, deposes and says:

1. I am the Borough President of Staten Island, and have served as such since November, 1984. Prior to taking office as Borough President, I served as Deputy Borough President of Staten Island for ten years. As Borough President, I also serve as member of the Board of Estimate.

2. I am familiar with the facts and circumstances of this action and submit this Affidavit in support of defendants' contention that there are significant and justifiable reasons why the current composition and voting structure of the Board should be retained.

Affidavit of Ralph J. Lamberti Annexed to the Affirmation of Susan R. Rosenberg

3. Initially, I must reiterate that the other boroughs and their residents suffer no injury or prejudice by reason of the Borough President of Staten Island having one vote on the Board of Estimate. On the other hand, to deprive the Borough President of that one vote will result in irreparable injury to the approximately 360,000 residents of Staten Island. This can be demonstrated by the voting structure of the Board, the role played by the one vote assigned to Staten Island, and the ever present fact that citywide officials elected by all the voters have a majority of the votes on the Board.

4. Of the eleven votes on the Board, the three citywide officials, the Mayor, Comptroller and City Council President, elected by all of the voters of the City, have two votes each, for a total of six. Each Borough President has one vote for a total of five. Two citywide officials must be present at meetings to constitute a quorum and six votes constitute a majority. The smallest combination of two Boroughs which can effect a majority occurs when the Borough Presidents of Staten Island and the Bronx combine with two citywide members. As the Court has been apprised in previous argument, in 13,325 votes of the Board between February 3, 1980 and March 18, 1983, that combination occurred on only one solitary occasion, and resulted in no prejudice. Yet, in order for that combination to exist, the votes of two citywide officials elected by all the voters were required.

Ignoring even the *de minimus* instance of that combination, it is obvious that even the most populous borough, Brooklyn, is never injured by the one vote of the Staten Island Borough President.

The presence of the votes of citywide officials having a majority of the votes on the Board, in practice, prevents the domination of the full Board from being in the hands of officials representing a minority of the population of the city. The one vote of the Borough President of Staten Island is nevertheless vital to the residents of Staten Island.

5. Decisions of the Board of Estimate are made by an intricate process of give and take among its members. This is a political reality and is particularly true, for example, in the case of the capital budget in which each Borough President seeks support for projects in his or her Borough. In this connection, during my experience the Board has responded to community needs, without prejudice to any particular borough, time and time again. In the truest sense of the word, and in the best sense, it is a political body.

The Board's role in formulating the City's annual budget is, to many, one of its principal functions. Expenditures of money and allocation of resources have consistently been distributed along population lines. Each borough receives what it needs and generally deserves. With the citywide officials in control of the votes, such distribution is guaranteed. Were it to happen otherwise, the imbalance would undoubtedly be rectified on election day. It is unimaginable that the Mayor, Comptroller or City Council President could win reelection by giving fifty percent of the City's resources to Staten Island, while providing only a token to Brooklyn. Yet, with an equal vote to each borough, each borough is afforded the opportunity to fight for its fair share. Also, in the case of

less desirable aspects of City life, such as the siting and establishment of sewage plants, correctional institutions, or other controversial projects, the give and take among the Borough Presidents each having one vote assures that they are shared equitably.

If the vote of the Borough President of Staten Island on the Board were reduced in proportion, for example, to its size to Brooklyn, the vote would be approximately 1/6 of the vote of Brooklyn. In such case, under no circumstances would the Borough President of Staten Island hold a meaningful or influential vote; the responsibility of effectively representing Staten Island's interest would become virtually impossible. The Borough President of Staten Island would be relegated to the position of bystander in sessions of the Board. In that all important function of political give and take resulting in the adoption of capital budgets and other matters, the Borough President of Staten Island would not even be a participant.

The result then, should plaintiffs prevail, to cure an injury that does not and cannot in fact exist, would be to disenfranchise 360,000 residents of Staten Island.

The Court of Appeals, I understand, suggested that the presence of the three citywide members on the Board presents "novel issues" involving the application of the one-person, one-vote principle. I respectfully submit that the safeguard against Borough domination by the presence and voting strength of the citywide members on the Board is of sufficient consequence that it ought to be considered in resolving the "novel issues" in support of the Board's present structure.

6. I understand plaintiffs have suggested that the borough as an entity is a "historical anomaly" (Joint Stipu-

lation, p. 4, no. 4) and that conflicting local interests make it impossible to fairly represent all the residents of the borough. Insofar as Staten Island is concerned, I respectfully disagree. As Borough President of Staten Island, I represent *all* of its residents. Our borough has experienced a surge in population in recent years: in 1980, our population was 352,121, but by 1983, according to latest census estimates, our population had increased to 367,200. Notwithstanding our growth, however, Staten Island is still a relatively homogenous community and has a strong historic tradition as a borough. Moreover, the residents of Staten Island, as well as the residents of other boroughs, are concerned with streets, sewers, schools, hospitals, borough budgets, jails, sewage treatment plants, homeless, transportation, and similar matters in or out of their *own* borough, and not necessarily in another. Our residents, from the North to the South Shore, and from the East to the West Shore, share common interests and concerns.

Although composed historically of various towns, the residents of Tottenville do not live in isolation from the residents of St. George; the residents of Rosebank are not isolated from the residents of Travis, and the towns remain too small and geographically undefinable to have developed consistently competing interests which would preclude fair representation at the borough level. A State agency's plans to site a major garbage and coal burning power plant with demonstrably excessive levels of chemical and biological pollution increments in Staten Island's Travis area was of concern to all Staten Islanders. The outrage and tenacity of residents throughout the Borough in reaction to the prospect of such a facility eventually

led to the demise of this proposal. The relocation of the College of Staten Island from one community to another, a proposal presently under consideration, involves the concerns of all Staten Islanders, not only those of the affected communities. The proposal a few years ago to close the Public Health Hospital in the Clifton section of Staten Island was objected to by Staten Islanders from every community, not only those residing in the Clifton section. Across the board citizen involvement eventually led to the continuation of this facility as a private, major medical facility servicing the entire borough. Based upon my experience, and endless list of issues demonstrating the oneness of this borough's population could be cited. The towns and communities of Staten Island are uniquely interwoven and the borough as an entity can hardly be characterized as a "historical anomaly."

7. I understand that the degree of justification needed to preserve the Board's current structure may depend, at least in part, upon the extent of malapportionment found by the Court. I also understand that the formula used by the Court to determine the extent of deviation from population equality did not take into account the presence of the citywide members on the Board. I respectfully submit that their presence and participation as Board members cannot be ignored and should be taken into account. To do otherwise results in an unrealistic and artificially high quantification of Board malapportionment. The role, power, and responsibilities of the citywide members are no different than that of the Borough Presidents. The Board of Estimate is a collegial body. The eight members interact with each other in the business of the Board, and the citywide

representatives cannot be isolated as an entity separate from the borough representatives.

Board members, regardless of the size of their constituencies, act upon local issues, as well as issues of citywide concern. During my ten years of participation in the business of the Board of Estimate, I have witnessed numerous occasions wherein citywide representatives were the advocates for or against an issue of purely local concern to an individual borough. For example, the Comptroller recently came to the aid of Brooklyn's Williamsburg community to oppose siting the first resource recovery plant in that community; the Mayor was a principal supporter of the Charlotte Street housing development in the Bronx, a matter of special concern to Bronx citizens familiar with the need for the rehabilitation of that community; a citywide member led the fight to revitalize Manhattan's Times Square area. In each instance, the stance taken by the citywide member bore no relationship to broad citywide concerns, or to the citywide member's fundamental role in city government, i.e., Mayor, Comptroller, or City Council President. He or she was simply performing as an advocate for a particular neighborhood. Such occurrences are commonplace. Citywide members do not function in a vacuum. In effect, the citywide members provide each borough with an additional level of representation.

The Court of Appeals, I am informed, has alluded to the need to examine the issue raised by the present Board's "blending majority control with minority representation." The "minority representation" mentioned by the Court, I submit, was not an ethnic or racial minority, but a numerical minority, i.e., the Borough of Staten Island.

8. It should also be noted that much of the Board's work involves decisions on the disposition and use of public land. Because of this, the Borough President represents the community's interest in real property, trees, and all other natural assets located within the geographical boundaries of a borough. Most of the City's undeveloped land is on Staten Island. As Borough President, I must give a high priority to the preservation of a significant portion of this land for public educational and recreational use. In doing so, a benefit inures not just to Staten Islanders, but to all residents of the City. We have a greenbelt of natural lands, a scout camp used by children throughout the City and Long Island, a zoo which hosts school children bussed in daily, an island wildlife preserve, and other amenities of considerable social value. Support for and interest in these facilities exists in small pockets throughout the City, none of which alone is sufficient to ensure their preservation and development. Only by combining these interests in the context of a borough identity and borough pride can these important interests be served. In a sense, I represent certain interests of people throughout the City, not just on Staten Island. There is strong reason to maintain the boroughs as representational entities.

9. In much the same way that I must have a meaningful voice on the Board to protect Staten Island's natural assets, I must also be able to protect the health, safety, and welfare of its residents. Staten Island's undeveloped land and its remoteness from the rest of the City has for decades provided an irresistible temptation to dump every imaginable undesirable project on our shores. Study after

study has demonstrated that Staten Islanders have an excessive incidence of lung cancer. There can be little doubt that a major contributing factor is the high toxic pollution of our air. Yet, within the past few years alone, not only were we confronted with plans to site a major coal-and-garbage-burning power plant here, but also to construct a coal-slurry terminal and pipeline which would have destroyed waterfront and neighborhood properties on two Island shores. With the anticipated closing of all other City landfills, there are now plans to continue to pile garbage at Fresh Kills until it reaches a height of 500 feet, higher than the highest natural surface on the Island. Even with an equal vote on the Board, our success in fending off these life-threatening intrusions has been marginal. These are not matters merely of personal annoyance or evidence of a "not in my backyard" mentality. They are clear and present dangers to the well-being of my constituents.

10. Staten Island has long been considered and treated by others as the unwanted borough of the City. Although our borough, like Manhattan, is an island, we lack Manhattan's business center and large population and therefore remain geographically isolated from the remainder of the City. In fact, a comparison of the populations of the five boroughs between 1980 and 1983 reveals that while Manhattan's population actually decreased (from 1,427,533 to 1,425,300), as did the Bronx's (from 1,169,115 to 1,153,600) and Brooklyn's (from 2,230,936 to 2,226,600), only our borough and Queens showed an increase in population. The population in Queens, however, increased from 1,891,325 to only 1,900,800. Thus, based on the numbers

set forth above, although we are the least populous borough, we are also the fastest growing. Clearly, under these circumstances, any reduction in our representation on the Board would be grossly unfair and detrimental to our interests.

11. It should be noted that prior to the institution of this lawsuit, none of the Borough Presidents from the more populous boroughs ever complained that they were unable to represent their constituents because their vote was mathematically disproportionate to the Borough Presidents representing the less populous boroughs. The city-wide members never complained about the voting structure of the Board. It should also be noted that Mayor Edward I. Koch has urged this Court to leave the inner workings of the Board "undisturbed." (See Koch *affid.* ¶ 5). Comptroller Harrison Goldin is similarly in support of the Board as presently structured. (See Exh. A) City Council President Carol Bellamy, who is currently completing her final year of public service as City Council President, is not supportive of the present Board structure.

12. It has been said that the structure and composition of the Board of Estimate is unique. The Board of Estimate in its present form has reponded well to the needs of the people of the City of New York. The city is an amalgam of extremely diverse smaller governmental entities. This amalgam of regional and urban qualities is reflected in many aspects of the city's government, including the Board of Estimate as presently constituted. It is important that each citizen in the city have a right to meaningful representation. To apply the traditional formula to de-

Affidavit of Ralph J. Lamberti Annexed to the Affirmation of Susan R. Rosenberg

termine compliance with the one person-one vote principle without consideration to the various justifications hereinabove discussed, would be nothing more than an exercise in basic mathematics. It is difficult to believe that the authors of the *Reynolds* decision in 1964 ever intended that the principle enunciated therein should have such rigid application as to now disenfranchise the people of Staten Island. I respectfully submit that there is ample justification to sustain the Board of Estimate as presently composed, and urge the Court to find in favor of the defendants.

/s/ Ralph J. Lamberti
Ralph J. Lamberti

Sworn to before me this 19th day of March, 1985.

/s/ Ann M. Upton
Notary Public

Affirmation of Richard Emery, Read in Support of Summary Judgment, dated April 12, 1985

UNITED STATES DISTRICT COURT

Eastern District of New York

81 Civ. 3290 (ERN)

Beverly Morris, et al.,

Plaintiffs,

—against—

Board of Estimate, et al.,

Defendants.

I, Richard Emery, being duly admitted to practice law in the State of New York, affirm as follows:

1. I, along with Arthur Eisenberg, am counsel for the plaintiffs in the above-entitled action. I submit this affirmation in accordance with this Court's direction as outlined in its opinion, *Morris* v. *Board of Estimate*, 592 F. Supp. 1462, 1475, 1478 (E.D.N.Y. 1984) as well as pursuant to the February 13, 1985 stipulation of the parties and *amicus curiae*. This affirmation responds to the affidavits and exhibits filed on March 22, 1985, by the defendants and *amicus curiae* Marchi. This affirmation completes plaintiffs' submission in support of summary judgment.

3. The affirmation which follows is lengthy. Therefore, I will briefly provide here a summary in the nature of a table of contents. The affirmation will proceed as follows:

Procedural Background

EVALUATING THE PURPORTED JUSTIFICATIONS

A. INTRODUCTION

B. THE EVIDENCE SUBMITTED BY DEFENDANTS AND AMICUS MARCHI

(1) The Affidavit of Staten Island Borough President Ralph Lamberti

(2) The Affidavit of Assemblyman Robert Straniere

(3) State Senator John Marchi's Affidavit And Exhibits

C. CATEGORIZING THE PURPORTED "INTEREST" IN SUPPORT OF THE CURRENT BOARD

(1) Historical Factors

(2) Natural Boundaries

(3) The Integrity of Political Subdivisions

(4) The Effectiveness of the Board

(5) Meaningful Participation By the Lesser Boroughs in Board Affairs

(6) A Check on Executive Authority

CONCLUSION

PROCEDURAL BACKGROUND

4. In response to the opinion of the Second Circuit opinion in this case, *Morris* v. *Board of Estimate*, 707 F. 2d 686 (1983), the plaintiffs moved for summary judgment. In support of that summary judgment motion, plaintiffs filed numerous affidavits and exhibits as well as an extensive memorandum arguing that the current Board of Estimate representational scheme deviated from population equality, and therefore equal voting power among individual voters, by a far greater percentage than has ever before been judicially accepted. Plaintiffs further contended that no single, or combination of, justifications among those advanced by defendants and *amicus curiae* Marchi could justify such a gross deviation from fair voting strength among citizens. Finally, plaintiffs argued that a scheme, such as the Board of Estimate's, which by definition is unresponsive to population changes, cannot be squared with one person, one vote principles, especially in light of viable and available alternative schemes which satisfy the interests and policies for effectively governing New York City. See Memorandum of Law, December 16, 1983, and Appendix in Support of plaintiffs' Motion for Summary Judgment.

5. After the motion for summary judgment was filed, the parties agreed that the Court should bifurcate its disposition: first determining the appropriate mathematical methodology to evaluate deviations from voting equality inherent in the current Board scheme; and, second, deciding whether any acceptable justifications exist in the Board of Estimate scheme which could justify such deviations.

6. In this Court's August 21, 1984, opinion the mathematical methodology was fixed for assessing the percentage deviation from population equality. 592 F. Supp. at 1470-75. The Court found the deviation to be 132.9%. Thus, the first prong of the bifurcated procedure for ruling on the plaintiffs' motion was complete.

7. As to the disposition of the second prong of the motion—an investigation of potential justifications for deviations—the Court directed the parties to explore the specific interests underlying other litigated representational schemes in several recent cases, as well as any other interests which may be applicable in this case. 592 F. Supp. at 1475. The Court pointed to the interest of municipal boundaries, the integrity of various political subdivisions, compact districts of contiguous territory, natural boundaries, intergovernmental coordination, political interests, the effectiveness of the Board and meaningful participation by the lesser populated boroughs in Board affairs. 592 F. Supp. at 1477.

8. The proceedings since this Court's last opinion have been directed primarily at resolving this remaining question. To that end, on October 18, 1984, the parties submitted to the Court a "Joint Stipulation of Policies and Interests Served By the Board of Estimate" in which defendants asserted, and plaintiffs either disputed or qualified, rather cryptic and ambiguous statements of purported interests in maintaining the current Board scheme. In that regard, the Court commented at a conference on October 31, 1984:

> [I] must say there is still a certain lack of sharpness about the formulation of the matters that may yet have to be explored as the second phase of this case." Tr. p. 3.

In an attempt to further sharpen the definition of the interests to be evaluated by the Court, the parties stipulated on February 13, 1985, to forego oral testimony and

submit in writing purported justifications for the extant deviations. This, the defendants and *amicus* Marchi have now done.

Evaluating the Purported Justifications

A. Introduction

9. The defendants' and *amicus* Marchi's asserted justifications fall into six categories: (1) historical factors; (2) natural boundaries; (3) the integrity of political subdivisions; (4) the effectiveness of the Board; (5) meaningful participation by the lesser populated boroughs in Board affairs and (6) a check on executive authority.[1] Though

[1] For the Court's convenience, I shall list below the number of the "interest" described in the previously filed "Joint Stipulation," which falls under each of the above six categories.

Category 1—"Interests" 5, 6, 9
Category 2—"Interests" 5
Category 3—"Interests" 4, 6, 7, 9, 14
Category 4—"Interests" 8, 4, 10, 11, 12, 13, 14, 16
Category 5—"Interests" 3, 4, 7, 9, 14, 17, 18
Category 6—"Interests" 15

Because the asserted "interests" in the "Joint Stipulation" are so loosely defined, several seem to fall into more than one category. However, none seems to require any catgory beyond the six described above.

Similarly, defendants' and *amicus* Marchi's most recent affidavit submissions fall into these six categories. But because these are new submissions, plaintiff will respond to them more completely below.

It should be noted that asserted "interests" #1 and #2 in the "Joint Stipulation" are in reality not justifications for deviations from population equality at all, but rather cryptic legal arguments in favor of preserving the present Board. In that regard, interest #1, the asserted "absence of demonstrate injury" under the present scheme of six citywide officials sitting together with the five borough presidents was rejected by this Court in its opinion fixing its methodology for analysis. This Court found cognizable, absent any showing of specific prejudice, mathematical deviations from voting equality notwithstanding the presence of three citywide

(footnote continued on following page)

the defendants and *amicus* Marchi have proferred these interests without organizing them, each of the interests cited in the "Joint Stipulation" and, most recently, in the affidavits in opposition to plaintiffs' summary judgment motion, falls within one or more of these headings.

10. Plaintiffs have already addressed several of the purported justifications in detail in their "Memorandum in Support of Summary Judgment." at pp. 44-52, 70-84. The Court is respectfully referred to these discussions. In their "Memorandum," plaintiffs argue that defendants' claims of representation for boroughs are exaggerated because New York (except for Staten Island) has become a city of neighborhood interests rather than borough interests. This is consistent with the decrease in borough governmental powers after the 1963 Charter revisions. At least one of the defendants in the instant litigation City Coun-

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officials who could control the Board with six votes. 492 F. Supp. at 1467-69, 1470-75. Moreover, plaintiffs demonstrate in their "Memorandum in Support of Summary Judgment" that there is evidence of specific prejudice in capital budget allocations and for local representation generally. See plaintiffs' Memorandum pp. 44-52 and A hereto. Finally, the defendants' assertion of absence of prejudice ignores the heart of one [illegible] one vote principles; namely, no single voter's power may be diluted absent adequate justification. No further prejudice need be shown.

As to asserted #2, "uniqueness of the Board," this standing for its own sake cannot qualify as a justification for voting dilution. Uniqueness must serve some purpose to rise to the level of a significant or meaningful political interest in a voting scheme. In any event, it is by no means clear that the Board is unique among American cities. As *amicus* Marchi points out, at ¶29 of his affidavit, the composition of the City Council of Virginia Beach, Virginia, "is significantly similar" to the Board scheme. The Supreme Court upheld this scheme in *Dusch* v. *Davis*, 387 U.S. 112 (1967) but only because each member of the council was elected at-large.

cil President Carol Bellamy apparently agrees with the plaintiffs on this point. See, Exhibit B. As a result, this defendant has received permission to be dismissed as an individual defendant in this case. See, Stipulation of March 4, 1984. In their "Memorandum," plaintiffs also argue that tangible prejudice in economic allocation flows from the present Board scheme, and that disproportionate benefits inure to Staten Island, at least by comparison to other homogeneous areas of equal population in other boroughs which do not have their own representative on the Board of Estimate. See pp. 50-52, 83-84. Finally, plaintiffs demonstrate that *equality* of borough representation, when population deviations between boroughs are extreme, cannot be justified under well-established precedent, see pp. 70-80, and that the Board's voting practices and rules do not mitigate the voting dilution inherent in such a scheme. See pp. 80-82.

11. In that regard it bears repeating that Supreme Court evaluations of purported justifications from voting equality have never tolerated or accepted a deviation greater than 16.4%. See *Mahan* v. *Howell*, 410 U.S. 315, *modified on other grounds*, 411 U.S. 922 (1973) (16.4% upheld) and *Swann* v. *Adams*, 385 U.S. 440 (1967) (26% found unacceptable). Though the Court has regularly evaluated "legitimate considerations incident to the effectuation of rational state policy,"[2] it has required as a

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[2] *Reynolds* v. *Sims*, 377 U.S. 533, 579 (1964); see also *Brown* v. *Thomson*, 462 U.S. 835, 103 S. Ct. 2640, 2695 (1983); *Gaffney* v. *Cummings*, 412 U.S. 735, 742 (1973); *Mahan* v. *Howell*, *supra* at 325; *Abate* v. *Mundt*, 403 U.S. 182, 185 (1971); *Avery* v. *Midland County*, 390 U.S. 474, 484-85 (1968); *Swann* v. *Adams*, *supra* at 444 (1967); *Roman* v. *Sincock*, 377 U.S. 695, 710 (1964); *Davis* v. *Mann*, 377 U.S. 678, 692 (1964); cf. *Chapman* v. *Meier*, 420 U.S. 1, 25 (1975).

prerequisite to such evaluations a showing that the defendants have engaged in an "honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." [3] Moreover, a "state's policy urged in justification of disparity in district population, however rational cannot constitutionally be permitted to emasculate the goal of substantial equality." [4]

12. This Court's recent decision in *Andrews* v. *Koch*, 528 F. Supp. 246 (E.D.N.Y. 1981), *summ. affd.* 688 F.2d 815 (2nd Cir. 1982) perhaps better than any other, directly addresses the concerns at hand. There, two council-at-large seats from each borough introduced a deviation of 50.4% from voting equality. The cause of this deviation was identical to the cause in this case—equal representation by borough even though Staten Island is only one sixth the population of Brooklyn. The asserted justifications for the deviation inherent in the City Council scheme were somewhat more compelling than those proferred in support of the current Board of Estimate scheme. In *Andrews*, justifications consisted not only of the six areas of interests present here, but are asserted by defendants to support representation by "boroughs, a strong traditional base in New York City government," 528 F. Supp. at 249, but in addition, a powerful political justification absent in this case, the City's interest in minority party representation on the City Council which was assured by one of each set of at-large seats being available only to

[3] *Reynolds* v. *Sims*, *supra* at 577; see also *Brown* v. *Thomson*, *supra* at 103 S. Ct. 2690, 2695-96; *Gaffney* v. *Cummings*, *supra* at 748-49; *Mahan* v. *Howell*, *supra* at 3242.

[4] *Mahan* v. *Howell*, *supra*, at 326 (16.4% acceptable).

a minority party. Moreover, in *Andrews*, Staten Island had at stake more than half of its City Council representation. It was represented by only one and a half *district* council members but two at-large seats. Thus, in *Andrews*, this Court refused to accept the dual interests of borough representation and minority political party representation, along with the interest of maintaining the lion's share of Staten Island's delegation to the City Council, as adequate justification for a deviation far smaller than that at issue here.

B. *The Evidence Submitted By Defendants And Amicus Marchi*

13. In asserting justifications for the present Board scheme, notwithstanding its 132.9% deviation, the parties defending the *status quo* have taken somewhat different tacks. The City, as defendant, by the affidavit of Susan Rosenberg, has chosen to rely primarily on the arguments it made in its October 26, 1983, memorandum concerning the Board's voting practices and rules. Those matters are discussed in plaintiffs' "Memorandum In Support of Summary Judgment" at pp. 77-82. The City also relies on the "Interests" listed in the parties "Joint Stipulation." [5] Finally, the City relies on two affidavits submitted by the Mayor and Staten Island Borough President Lamberti, both of which will be discussed below in connection with plaintiffs' discussion of each of the affidavits which have been offered.

14. Other than the Mayor and, the borough president from Staten Island none of the original parties to this lawsuit have chosen to defend it by submission of affidavits

[5] See footnote 1 on p. 4.

or other evidence.[6] Thus, four borough presidents and the Comptroller have abstained, except insofar as they passively join the City's overall position in this case.

(1) *The Affidavit of Staten Island Borough President Ralph Lamberti*

15. The primary effort in support of justifying the 132.9% deviation is offered by the parties and *amicus* from Staten Island. The Mayor's affidavit simply pleads for this Court to leave well enough alone, saying that the Board functions effectively. The effective functioning of the Board will be discussed extensively, below. Borough President Lamberti's affidavit, however, first asserts the claim that the other boroughs are not prejudiced by his one vote.[7] To support this point, Lamberti reiterates the City's earlier arguments concerning the voting practices and rules of the Board, emphasizing the presence of the majority of citywide officials. See Lamberti affidavit ¶ 3-5 and see, plaintiffs' "Memorandum" pp. 77-82. In that regard, he contends that the presence of citywide members on the Board, assures fairness to all the boroughs. Lamberti affidavit, ¶ 5. Nonetheless, he illogically concludes

[6] As noted above, City Council President Carol Bellamy has apparently agreed with plaintiffs' position. See supra, at p. 7 and Ex. B.

[7] These are assertions of fact with which plaintiffs do not agree. These claims are unsupportable and if the Court finds them relevant to disposition of this case, the plaintiffs assert their right to a hearing. However, plaintiffs firmly believe that unjustified dilution of individual voting rights is the only criterion which need be demonstrated to warrant the requested relief. Plaintiffs do not understand these claims to be relevant either to a showing of voting rights dilution or the justifications therefore, the only two issues relevant to disposition of this case.

that Staten Island requires an *equal* vote, as opposed to a vote reflective of its population, to assure that it will receive a fair share. Id. at ¶ 5, p. 4.

16. Lamberti then argues that as borough president of Staten Island he is able to represent his homogeneous constituency; that the interests of Staten Island's residents are relatively uniform. Id. at ¶ 6; see also Trautmann affidavit attached as Ex. D to the affidavit of *amicus* Marchi. Plaintiffs, of course, agree on just this point. From the outset, plaintiffs have asserted this as one primary aspect of the actual prejudice to the Board's unconstitutional scheme. Only Staten Island has a representative for its homogeneous interests; whereas, each of the other boroughs has similarly homogeneous areas within their boundaries with populations as large as Staten Island, but none of these areas has a single representative or voting power on the Board. Thus these neighborhoods in the other boroughs are prejudiced in that they cannot get the attention and protection which Staten Island has secured. See Plaintiffs' Memorandum, passim.

17. Next, Lamberti reverts to the argument that the presence of the citywide officials assures fair representation. He characterizes the Board as a "collegial body" in which the various representatives work together on local and citywide issues. He cites examples of the involvement of citywide officials in issues that he characterizes as "local." Id. at ¶ 7. Plaintiffs again agree that the Board is a "collegial body" in which all members address both local and citywide matters. Of course, "borough courtesy" is an unwritten rule commanding deference to the borough president of the borough where any specific issue is cited.

See Plaintiffs' Appendix in support of motion for summary judgment, Sayre and Kaufman, *Governing New York City* (1960) pp. 643; New York State Charter Revision Commission for New York City, *Borough Government Report* (1973) pp. 41-47. However, given just this "collegial" nature of the body, it seems plain that *equal* voting power for each borough is not a prerequisite to optimal functioning. In fact, nothing Lamberti cites supports the requirement of equal voting power for each borough. And, the history of the Board as a "collegial body" demonstrates that equal votes are not necessary for its effective operation.

18. From 1901 until 1958, a period during which the Board was far more powerful than it is today, Staten Island had one vote to the two held by Manhattan and Brooklyn. Although the votes were not weighted to satisfy modern one person, one vote requirements, this voting structure recognized the vast population differentials between the boroughs. As Lamberti admits and the Maniscalco Affidavit demonstrates, the plain fact is that the rule of "borough courtesy" and the "collegial" operations of the Board protected the lesser represented boroughs from the feared rapaciousness of the larger. See Ex. B, ¶ 19, attached to affidavit of *amicus* Marchi, discussed below. Similarly, weighted voting achieves the same result. Just as we know that small towns among larger which comprise the many county boards of supervisors in New York State are protected by deference to their representatives who have small weighted votes, we can be assured that the smaller boroughs will be protected notwithstanding their lesser voting power. See *League of Women Voters* v. *Nassau County Board of Supervisors,* 737 F. 2d 1477

(2d Cir. 1984); *Greenwald* v. *Board of Supervisors,* 567 F. Supp. 200, aff'd. 742 F. 2d 1434 (1983). In fact, the smaller boroughs will derive even greater protection than small towns represented on county boards simply because the citywide at-large members (who have no counterparts on the county boards) will protect the interests of the smaller boroughs in the collegial process. Thus, there is no basis to support the Lamberti claims, ¶ 8-9, that Staten Island's natural resources will be ravaged and that the City will dump undesirable projects in that borough merely because *equal* voting power is altered for that borough. If that were to be the case, the present Board scheme allowing Staten Island only one vote, would lend itself to those needs. Such fears are exaggerated and, in any event, do not detract from a system of votes reflective of population deviations, as long as such a voting system provides Staten Island with a meaningful vote. See Exs. D and E and discussion below. Thus, Lamberti's argument that the Board with its majority of citywide members is a "collegial body" which protects Staten Island notwithstanding its single vote and the lure of its land and resources, contradicts his argument that a vote equal to the other boroughs is a prerequisite to securing the interests of Staten Island.[8]

[8] The flip-side of this argument is that since Staten Island is part of the City, it does not deserve any more protection than any other area populated by 350,000 people. Like any other such area its representation on the Board should serve to protect its assets and fend off city-imposed liabilities. But to preserve Staten Island's unfair advantage in this process, which its representatives essentially concede that it now has, and which they are fighting to preserve, is to violate the very essence of one person, one vote protections.

(2) *The Affidavit of Assemblyman Robert Straniere*

19. Intervenor Robert Straniere offers the only new argument in support of justification of the 132.9% deviation inherent in the Board's current structure. He argues that in creating New York City out of five counties, the State Legislature intended to perpetuate the county structure even within the City of New York. Affidavit of Straniere ¶ 6-12. Moreover, he argues from the time the Board structure was approved in 1901, the State Legislature sought to guarantee direct borough representation on the Board. Id. at ¶ 7. And, that up until the present time the State Legislature has exhibited a continuing state policy in maintaining the five borough system notwithstanding the overall recognition of the City. Intervenor Straniere then argues that such state policy is akin to that accepted by the Supreme Court in *Brown* v. *Thomson, supra,* where continued separate representation of the one Wyoming county which was challenged, was held to justify the minimal dilutive effect on the voters of the remainder of the state, given the importance of the county system of government in that state. Id. at ¶ 8-20.

20. Plaintiffs are not required to contest this analysis because compliance with one person, one vote requirements in this case does not preclude full recognition of Staten Island as a county of the State and City.[9] Notably, Staten

[9] It must be noted, as *amicus* Marchi's affidavit clarifies, that the Legislature has generally treated the five counties which comprise New York City very differently from other counties in the state. Generally, all local powers are vested in the City, where elsewhere, such powers vest in county governments. See, affidavit of *amicus* Marchi, ¶22-23; Municipal Home Rule Law, Constitutional Provisions §§ 1(a), (h)(1), 2(b)(2), 3(d)(1); Article I, Sec. 2(5)(12); Art. III, Sec. 31; Art. 5, Sec. 40; Art. 6, Sec. 50(2).

Island was recognized as a county of both the State and City for the 58 years (from 1901-58) when it had only one vote to the two each, which Manhattan and Brooklyn held. Staten Island has, and is guaranteed, the full representation which its population warrants in the State Legislature. But, its representatives here argue for far more than the full representation which its population warrants in the City's Board of Estimate. Respect by the State for Staten Island's status as a county cannot justify disproportionate representation in City matters. The State must abide by the constitutional dictate that counties are entitled to representation in the Legislature which is proportionate to the population of each county. *Flateau* v. *Anderson,* 537 F. Supp. 257 (S.D.N.Y.), *cert. denied,* 458 U.S. 1123 (1982). The State, therefore, cannot guarantee that counties retain disproportionate representation in local municipal bodies which are also under the constraint of constitutional protection.[10] *Avery* v. *Midland County,* 390 U.S. 474 (1968).

21. Moreover, this case is unlike *Brown* v. *Thomson, supra,* in a fundamental respect. In *Brown,* the plaintiffs sought to deny representation to a single county because of its size. Here plaintiffs do not seek to deny Staten Island direct and separate representation as a county not-

[10] The essence of Straniere's argument is undercut by Municipal Home Rule legislation passed in 1969 in the wake of many reapportionment controversies. The text of Article 2 §10(a)(b)(c)(h) as amended is quoted in Ex. C as is the state policy underlying this legislation. This legislation and policy specifically sets forth the State's command that local municipal governing institutions strictly comply with one person, one vote. The statute and its legislative history demonstrate the State's commitment to weighted voting schemes as one method of satisfying one person, one vote requirements. See Ex. C.

withstanding its size. No conceivable remedy to the Board's current constitutional difficulty would deny Staten Island direct and separate representation as a county. Moreover, the interest at stake in *Thomson* was far more compelling than that at stake here. The counties in Wyoming, as discussed in *Brown,* were the full-fledged basic unit of local government; whereas, in New York State counties are the basic unit of local government *except* in New York City where City government under state authority has taken over all but a few remaining vestiges (e.g. county district attorney, county clerk) of traditional county government. (e.g. adoption of local laws, franchises, land use, taxation, fire, police and sanitation). See plaintiffs' Memorandum at pp. 67, 68, 72-3, 75; see fn. 9, above.

2. Finally, as this Court points out in its August 21, 1984, decision, there exist many potential schemes which guarantee effective representation of lesser populated geographic areas within a governing body, consistent with one person, one vote:

> Ascertaining at this time whether significant input by the smaller boroughs is a valid concern fostered by the Board may be especially important if the Board is eventually reapportioned, since certain electoral models "assure that sparsely populated areas . . . have a voice in the councils of government." *Greenwald* v. *Board of Supervisors of the County of Sullivan,* 567 F. Supp. 200, 203 (S.D.N.Y.) (upholding the constitutionality of an adjusted weighted voting plan) (footnote omitted). *See also Baker* v. *Regional High School District No. 5,* 476 F. Supp. 319, 321, 323 (D. Conn. 1979) (In tentatively approving an "ingenious" condition for a three-town board of education preventing

> majority votes from being carried by the largest town alone or by the two smallest towns together, the court described the total plan as an apparently "conscientious effort to comply with constitutional requirements while providing sufficient checks on majority action. . . ."). *See generally Sailors* v. *Board of Education,* 387 U.S. 105, 110-11, 87 S. Ct. 1549, 1553, 18 L. Ed. 2d 650 (1967) ("Viable local governments may need many innovations numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation.") 492 F. Supp. at 1477.

In that regard, many counties in New York State are governed by a county board of supervisors. *League of Women Voters* v. *Nassau County Board of Supervisors, supra* at fn. 10; *Greenwald* v. *Board of Supervisors, supra, Ianucci* v. *Board of Supervisors,* 20 N.Y. 2d 244, 282 N.Y.S. 2d 502 (1967). Weighted voting under a Banzhaf mathematical model is employed to assure meaningful participation and representation for even the smallest participant. Full recognition of local municipal units is possible under this system while at the same time providing votes to representatives in weights that correlate both with the population they represent and fair voting power (as defined by the opportunity to cast the deciding vote—the "critical vote"—discussed further below). Such a system conforms with one person, one vote requirements under *Ianucci, Greenwald,* and *League of Women Voters* and clearly provides one method of assuring that Staten Island continues to be directly represented as a county unit of government and does not become a "by-stander" on the

Board. See affidavit of Professor Lee Papanayopolous attached as Ex. D. Such a system guarantees that Staten Island as a county will have its fair share of influence in situations when critical votes are cast. (See more complete discussion hereafter at p. 39-43) And, such a system is readily available, as described in Ex. E by Professor Steven Brams, whose expertise this Court has previously recognized. 592 F. Supp. at 1474.

23. Straniere's remaining arguments focus on the effectiveness of the present board, its ability to assure meaningful participation by the lesser populated counties and its role as a check on executive authority. Id. at ¶21-52. As to the issue of effectiveness, the central flaw in Straniere's argument is plainly identifiable from the first sentence of ¶28 of his affidavit:

> Effective representation, in light of *Reynolds,* amounts to the ability of representative to advance the interests of his or her constituency on a substantially equal basis with the other representatives elected to a legislative body that makes governmental decisions affecting their respective constituencies.

This is simply not the case where elected officials represent districts of vastly different populations. *Reynolds* does not guarantee equal protection to legislators or counties, but to people. The essence of *Reynolds* is that legislators represent people, not geography, and that people are entitled to a fair share of the vote, not legislators:

> To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote.

> The complexions of societies and civilizations change, often with amazing rapidity. A nation once primarily rural in character becomes predominantly urban. Representation schemes once fair and equitable become archaic and outdated. But the basic principle of representative government remains, and must remain, unchanged—the weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies. A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln's vision of "government of the people, by the people, [and] for the people." (footnotes omitted) *Reynolds* v. *Sims,* 377 U.S. 533, 567-8 (1964).[11]

This principle in no way detracts from the necessity and opportunity of the Board to function effectively. None of the valid points made by Straniere or any other defendant or *amicus* Marchi require that the various county representatives have *equal* votes. The history of the Board prior to 1958 shows that equal votes among the county representatives is not a prerequisite to efficient functioning. If anything, the Board was more effective in the years prior to 1958, when it was even more powerful than it is now. During the pre-1958 period the Board functioned as a long-range planner and a repository of the City's

[11] Straniere also fails to recognize that this same principle is plainly the policy of the New York State Legislature of which he is a member. See Ex. C.

primary day-to-day power. Moreover, Straniere himself points out, ¶28 (along with defendant Lamberti and former borough president Maniscalco) that the Board is a "collegial body" permitting each representative, "[g]iven the relatively small size of the eight-member Board, the ability . . . to put forth the interests of his own county . . ." In that regard, no defendant nor *amicus* Marchi has offered any evidence that demonstrates that the effectiveness of the Board's functioning, which benefits each county and the City as a whole, is dependent on equal votes for the borough presidents or will be diminished if the Board operates under a system of weighted votes which reflects a fair share of voting power by population for each county. See Ex. D and E. There is no evidence that a Board reflective of population would be unable to serve the needs of the City and its counties.

24. Similarly, the effectiveness of the Board insofar as Straniere argues that it enables the counties and the City to balance their interests and needs, ¶11-16, will also not be diminished by votes weighted in accordance with voting power as determined by population. As long as borough presidents continue to represent the county as a unit, the various interests within the counties will struggle for the borough presidents' voice, as they do now,[12] and the various

[12] Plaintiffs have argued that borough president representation denies equal representation to homogeneous groups of the same size as Staten Island in the other counties. See plaintiffs' Memorandum at pp. 44-52, 83-84. If borough president votes are weighted by power, in accordance with population, see Ex. D and E, then at least the one homogeneous group—Staten Island—will not have more power than others, even though that group will have direct representation. It is clear, and plaintiffs concede, that the "justifications" and "interests" which are cited by

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county and City interests will struggle for the Board vote, as they do now. The only difference in a system reflective of population disparities will be that instead of the borough president of Staten Island having disproportionate power in critical vote situations, he or she, along with the representatives of the other boroughs will have power in critical vote situations commensurate with the population they represent. See Exs. D and E. As the Second Circuit recently decided in *League of Women Voters Nassau County Board of Supervisors, supra,* such a scheme and the various appropriate weights it entails are fully reflective of constitutional requirements. See Ex. D. Similarly, any one of a number of oher "ingenious" municipal experiments in government structure might well also satisfy all of these interests. See Ex. E and ¶17, above. Thus, Straniere's argument with respect to "meaningful participation of the lesser populated counties" is in some sense collapsed into his arguments relating to the "effectiveness" of the Board.[13]

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defendants and *amicus* Marchi warrant perpetuation of direct representation for Staten Island. Plaintiffs have no quarrel with this point. Plaintiffs *do* quarrel with the defendants' claim to disproportionate power for this direct representation. Thus, whatever option is chosen to cure this ill, whether it be weighted votes, expanded representation for other boroughs or one of the other "ingenious" methods mentioned in this Court's last opinion, 492 F. Supp. 1477, see also, Ex. E, direct representation for Staten Island and every other borough need not be sacrificed. Therefore, the effectiveness of the Board and its ability to coordinate local and citywide interests need not be compromised.

[13] At ¶35, Straniere incorrectly characterizes plaintiffs as having agreed that "the allocation of an equal voice to each of the five county representatives advances the policy of insuring that 'different parts of the City get their fair share of service contracts and capital budget allocations.'" "Joint Stipulation" ¶13. Plain-

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Since one of the Board's primary functions is to assure "meaningful participation" it cannot be effective without accomplishing this function.

25. Straniere further argues that Staten Island requires a vote on the Board equal to the other larger counties because of the Board's land-use planning functions. ¶33-40. He says these are local responsibilities and should be controlled locally. This argument, however, evades the plain scope of the Board's power. Staten Island does not have power over local land-use and the one vote out of eleven that it maintains on the Board is not the source of its control over its land-use planning. Whatever influence it has, derives from "borough courtesy" and the deference within the Board to the boroughs as a "collegial body." These aspects of Staten Island's power and influence remain intact under any one of a number of alternative Board schemes that is designed to protect this right. See Ex. E and 592 F. Supp. 1477. Violation of one person, one vote is not required to perpetuate Staten Island's current control over its land-use planning.

26. Moreover, were such control exercised by Staten Island as a result of its Board vote (and plaintiffs repeat —it is not) such control would be inappropriate. Though Staten Island remains a county it is, first and foremost,

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tiffs did not agree, stating unequivocally that "under the present Board structure the smaller boroughs obtain more than their allotted share by population, and that a Board reconstituted to comply with one person, one vote strictures could far better serve this function as it would more accurately reflect all the people's interests."

a borough of New York City.[14] As such, its land-use planning is to be exercised for the benefit, not only of Staten Islanders, but also for the citizens of the entire City. That was the essence of consolidation in 1898 as it is today. Thus, since such decisions should be made in the best interests of the City, it is unfair and improper for the citizens of Staten Island to exercise disproportionate power to better themselves, when the citizens of Brooklyn are less able to exercise equivalent power.

27. It is exactly for the above reasons that Straniere's arguments concerning a "tyranny of pure numbers," ¶36-44, make no sense. Were "a tyranny of pure numbers" the method of the present Board, Staten Island could and would always be outvoted. But because the politics of the Board affords restraint, courtesy and deference, depending on the specific issue, this does not occur. What does occur is that Staten Island with an equal vote has a mathematically quantifiable share of power with respect to its population in all *critical* votes of the Board. See Ex. D and E. It is in these critical votes where the politics of deference and restraint break down. These are the cases where voting power becomes important; all parties are unwilling to agree or defer. Thus, these are the cases where the minority prejudices the majority, because on a Board with equal votes for each borough president, the minority has far more than its fair share of critical votes. The "tyranny of pure numbers" which Straniere describes is in reality reversed. Instead of a tyranny dominated by the majority, the minority with undue control of critical votes determines an unfair proportion of the hotly dis-

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[14] See fn. 9, above, describing a plethora of state authority in support of this point.

puted issues. In this sense the minority's influence is genuinely disproportionate. Since Staten Island with an equal vote has 20% of the borough presidents' voting power, but only 5.3% of the population, it is overrepresented in this sense by 285% and Brooklyn is underrepresented by 37%. See Ex. E. This is the "tyranny" which must be brought back into focus. Only by expanding either voting weight or representation for the more populous boroughs can this imbalance in critical vote situations be cured. See Ex. D. Straniere's arguments in this section of his affidavit, are purely and simply anti-majoritarian and unfair. They are a fundamental rejection of the plain meaning of one person, one vote. Straniere Affidavit, e.g. ¶41, (decrying "a tyranny of pure numbers [in which] the smallest district would always have one-twentieth of a share of the voting power although it contains one-fifth of the total geographic area. . . .".)

28. Next, Straniere argues that the Board as presently constituted serves as a check on the Mayor's executive authority and supplements the City Council's authority. Straniere Affidavit ¶45-48. This is no doubt true; however, as long as the Board maintains its present functions and powers, the relationship with these two coordinate institutions of City government will not be altered. In other words, Straniere does not argue that an equal vote for each borough is necessary to serve as a check on executive authority. Nothing about a Board which complied with one person, one vote requirements would undermine this interest as long as each borough maintained direct representation.

28. Finally, Straniere argues that there are no acceptable alternatives to the present Board scheme. Id. at

¶49-52. He rejects both a weighted voting scheme and expansion of representation for the larger boroughs. He fails, however, to consider those alternatives suggested by this Court, as quoted above in ¶19, herein. He also fails to consider alternatives such as those suggested by Professor Brams in Ex. E. Moreover, he fails to consider a weighted voting scheme which is based upon critical votes under a Banzhaf analysis. See *League of Women Voters* v. *Nassau County Board of Supervisors, supra; Greenwald* v. *Board of Supervisors, supra; Ianucci* v. *Board of Supervisors, supra.* See also, Ex. D and E. Such a system would preserve a Board identical to the present scheme which Straniere seeks to save; yet, it would apportion votes to borough presidents in accordance with the proportion of critical votes each is entitled to, based on the borough's population. In this manner, each and every interest and justification which Straniere has identified can be respected without allowing any minority district undue influence over critical votes that the Board inevitably must face. Clearly, such a scheme fairly respects the interests of each borough and the City as a whole. Moreover, under *League of Women Voters, Greenwald,* and *Ianucci* a weighted voting scheme satisfies one person, one vote requirements.

(3) *State Senator John Marchi's Affidavit And Exhibits.*

30. The first portion of the Marchi affidavit traces the history of consolidation of the City prior to 1898. Marchi relies on the affidavit of Loring McMillen who is official borough historian for Staten Island. In essence their argument arising out of the period leading up to consolidation in 1898 is that Staten Island would never have chosen to

consolidate unless its citizens believed that they would be assured "meaningful representation" in the governance of New York City.[15] Of course, plaintiffs do not disagree. It is plaintiffs' position, in this regard, that even when Staten Island had one-half of the vote of Manhattan and Brooklyn, until 1958, it had more than its share of "meaningful representation" on the Board. Plaintiffs' position in this regard is simply that Staten Island has been consistently overrepresented and that only if its voting power in the Board's critical votes is correlated to its relative population will it be properly and "meaningfully represented." See, Ex. D and E. Moreover, plaintiffs do not suggest that sacrificing direct representation by the borough president of each county is necessary to achieve one person, one vote compliance. Just the opposite, Staten Island and every other county should maintain "direct representation on the Board." See ¶13, Marchi affidavit.

31. Next, Marchi argues, as does Straniere, that the State has played the primary role in reforming the gov-

[15] Mr. McMillen admits that the records nowhere reflect any discussions of assurances of "meaningful representation." McMillen affidavit ¶18. Moreover, it is clear that Staten Islanders more wanted to consolidate with New York than any other borough, at least, insofar as the referendum is reflected of that desire. Id. at ¶13. Finally, it is undisputed that the borough presidents were never considered for Board membership until 1901 when Brooklynites succeeded in amending the Charter to assure borough president presence on the Board. See *Kramarsky Report*, p. 4. To the extent that the history of the Board is relevant at this early period, its primary importance is the fact that Staten Island gave up its local authority to the centralized city government which, thereafter, became the primary municipal force throughout the five counties comprising the City. As the centralized power of the City grew with each major Charter revision, the separate and historic functions associated with Staten Island, or any other county, diminished. See plaintiffs' Memorandum at pp. 9-21.

ernment of New York City.[16] Id. at ¶14-17. Again, this is not at cross-purposes with plaintiffs' position. When the state altered the Board's voting structure in 1958 it did so prior to the application of one person, one vote principles. Whatever political compromises, policies and interests caused the change of the Board's voting structure, the Legislature could not possibly have accounted for constitutional principles applied to municipalities ten years later. *Avery* v. *Midland County,* 390 U.S. 474 (1968).

32. In any event, it is notable and significant here that former borough president Albert Maniscalco, in his affidavit in support of the Marchi affidavit, states unequivocally that even before the 1958 voting change, when he had one-half the vote of two other borough presidents, "my opinion and expertise on matters relating to my borough was, I believe, given the same credence and weight by other Board members in their deliberations whether I cast one or two votes. . . . , Since I was a meaningful participant able to influence the outcome of a vote." See Maniscalco affidavit ¶19. Thus, as long as his vote was viewed as potentially critical, the borough president played a significant role in Board deliberations. It is just this sort of evidence which plaintiffs believe demonstrates the absence of valid "interest" and "justifications" adequate to support the current Board scheme. On the other hand, a scheme with votes weighted by population share of critical votes would fit exactly within the Maniscalco analysis. See, Exs. D and E.

[16] Undoubtedly, one reason that Charter revision has been achieved on several occasions by the State Legislature is because it is simply easier to pass such legislation with the support of the City's legislators, than it is to hold a local referendum.

33. The Marchi affidavit, ¶19 cites numerous statutory examples of the Legislature's use of the boroughs to distribute appointments. These arguments were previously addressed in plaintiffs' Memorandum at p. 76, fn. 102. Special note should be taken of *Oliver* v. *Board of Education,* 306 F. Supp. 1286 (S.D.N.Y. 1969) in which the election of the Board of Education of the City of New York was struck-down because members were elected by borough and, thus, in violation of one person, one vote. The affidavit of James Regan speaks to the functioning of the current Board of Education which is appointive by borough. The affidavit asserts that the system works well as presently constituted. Again, plaintiffs need not dispute Mr. Regan's conclusions to support their arguments concerning the Board of Estimate.

34. The thrust of the next section of the Marchi affidavit, ¶21-25, is to further argue the policy of the State to guarantee rights to local government. But as the affidavit plainly sets forth, the rights of local governments apply to counties " 'except those wholly included within a city.' " Id. at ¶23. This plain policy statement clarifies, that notwithstanding the Straniere and Marchi arguments to the contrary, the policy of the State Legislature has been uniformly to render the rights of the five New York counties wholly subservient to those of the City as the predominant local entity.[17] It is thus fair to say that the State Legislature has not intended to assure Staten Island one vote on the Board in violation of one person, one vote. Specific

[17] See fn. 9, supra.

legislative policy is contrary to such a claim.[18] See fn. 10 and Ex. C. above.

35. Finally, the Marchi affidavit argues that the Board "is needed" and "it works." Id. at ¶26-33. Again, plaintiffs do not disagree. The Board serves its function well, even if not as democratically as plaintiffs and some critics would like.[19] By the same token, nothing in the Marchi affidavit or its exhibits demonstrates that the Board could not just as well serve its purposes, employing a scheme consistent with one person, one vote. As the Marchi affidavit itself points out, an analogous system was upheld by the Supreme Court in *Dusch* v. *David,* 387 U.S. 112 (1967). There, as this Court is aware, a unique form of municipal government satisfied one person, one vote strictures by employing an ingenious approach to voting and residency requirements. Regrettably, the current Board of Estimate scheme is entirely unadaptable to population shifts and, thus, entirely outside one person, one vote re-

[18] In 1975, at the time of the most recent Charter revision of Board powers, the Legislature must be presumed to have followed the Court of Appeals decision from 1969 in *Bergerman* v. *Lindsay,* 25 N.Y. 2d 405, 306 N.Y.S. 2d 898 (1969) *cert. den.,* 398 U.S. 955 (1970) upholding the Board as not subject to one person, one vote. Thus, arguments concerning the Legislature's failure to reform the Board in 1975 are not on point.

[19] There have been several recent criticisms of the Board's undemocratic practices and procedures, which contradict the affidavits of the Mayor and Senator Marchi, claiming that the Board's functioning is uncontroversial. Most criticism has focused on the undemocratic nature of the Board's executive sessions which result in final decisions well before public hearings. The critics complain that such hearings are a sham. See Ex. B and F and *Kramarsky Report* pp. 20-26, 112; see also, Transcripts of the New York City Charter Revision Commission Public Hearings, Bronx County Courthouse pp. 87, 90. (Feb. 3, 1983).

quirements. Like affiants Maniscalo and Marchi, plaintiffs do not wish to eliminate "meaningful representation" for Staten Island. Plaintiffs merely wish to conform such representation to population requirements within a City that has many other citizens whose individual voting rights are at stake. In that regard, this Court and defendants plainly understand that plaintiffs do not seek relief *against* Staten Islanders, but rather *on behalf of* a large majority of the remaining citizens of New York.

C. *Categorizing the Purported "Interests" In Support of the Current Board Scheme.*

36. As is indicated by the above response to defendants' and *amicus'* Marchi's presentation, no attempt to place the purported "interests" into categories of justifications has been made by the defendants or *amicus* Marchi. In this Court's August 21, 1984, opinion, the Court began this process. 592 F. Supp. at 1475-77. Below, plaintiffs will attempt to complete it for the "interests" which have been proferred to date. As alluded to above in ¶ 7 above, plaintiffs believe that all of the identified interests fall into six categories: (1) historical factors; (2) natural boundaries; (3) integrity of political subdivisions; (4) the effectiveness of the Board; (5) meaningful participation by the lesser populated boroughs in Board affairs; and, (6) a check on executive authority.

38. The heart of plaintiffs' response to each and all of these purported justifications is that a Board with an *equal* vote for the representative from each borough is unnecessary to satisfy the interests that fall into these categories. Therefore, the purported justifications for inordinately

large deviations from voting equality fail because the interests that support these justifications may be satisfied by a Board scheme that comports with one person, one vote dictates. Since none of the concededly valid interests requires the voting dilution which results from equal representation for vastly different sized boroughs, no justification exists for deviating from one person, one vote strictures. A review of the asserted interest by category of purported justification clarifies this point.

(1) *Historical Factors.*

38. The history of the Board is not complicated. When New York was consolidated in 1898, Staten Island joined the other counties before borough representation existed on the Board of Estimate. In 1901, when Brooklyn politicians forced the amendment of the City Charter, the borough presidents joined the Board. From 1901 until 1958, Staten Island, Queens, and the Bronx had one vote each, to Manhattan and Brooklyn's two each. In 1958 each of the boroughs was given an equal vote without consideration of population differentials. This voting distribution has remained unchanged. During the entire period of the Board's existence it has gained in power as compared to the dwindling functions of the borough governments. Board membership has evolved into the primary power of the borough president. This evolution is a reflection of the concentration of power in the City government which has become the source of virtually all local governing power. Thus, the history of the City and the Board does not support any argument for the necessity of an *equal* vote for each borough representative on the Board. Rather, the City's history supports the conclusion that the

Board plays a singularly influential role in exercising the enormous centralized power of the City. It is this centralized power which plaintiffs contend should be exercised in accordance with decisions made by a body which proportionately reflects the relative populations of each borough. As will be described below, such a reform does not preclude direct and meaningful representation for each of the lesser populated boroughs.

(2) *Natural Boundaries.*

39. Plaintiffs concede a continuing interest in maintaining the natural boundaries of the five boroughs, notwithstanding the plaintiffs' lack of knowledge as to how the Brooklyn-Queens boundary was determined. Clearly, Staten Island's boundaries deserve respect in any districting scheme. It is notable, however, that neither federal, state legislative nor city council districts are entirely coextensive with Staten Island or the other boroughs. This is entirely as a result of one person, one vote requirements which demand population concessions across these natural boundaries. In the case of the Board of Estimate, however, it would be desirable, if the districts which comprise the Board respect traditional county lines. Multiple alternative representational schemes that comport with one person, one vote dictates are readily available to satisfy the interest of respect for natural boundaries. Thus natural boundaries do not constitute an interest which amounts to a justification for deviating substantially from one person, one vote parity.

(3) *The Integrity of Political Subdivisions.*

40. This interest is clearly cognizable, but like that of natural boundaries, it is not in conflict with a Board scheme that conforms to one person, one vote requirements. Each of the five vestigial county government constitutes a political subdivision of the City of New York which deserves to have its integrity respected. The Board's representational scheme need not impinge upon either the functions or the jurisdiction of the county governments. As long as the chief executives of the county governments are representatives on the Board, there will be no necessity to compromise the integrity of these subdivisions. Representation by the borough presidents is adequate to serve this interest. It is not necessary that each borough representative have an equal vote. This point is best illustrated by the schemes that New York counties employ to constitute county boards of supervisors. As this Court is well aware from the Second Circuit's (by Judge Neaher) recent decision in *League of Women Voters* v. *Nassau County Board of Supervisors, supra*, towns which comprise the political subdivisions of these boards maintain their integrity by assuring town representation through town supervisor-representatives whose weighted vote is set in proportion to the voting power which the population of each town should fairly command. This method of respecting the integrity of political subdivisions within a body comprised of the executives of those subdivisions—akin to the Board of Estimate—has been constitutionally sanctioned on the basis of Banzhaf weighted votes since the New York Court of Appeals approved such schemes in *Iannucci* v. *Board of Supervisors, supra*, in 1969. See Ex. D. and *Greenwald* v. *Board of Supervisors, supra*. No county board has suc-

cessfully argued that each town member should have an equal vote notwithstanding large population deviations. And, it is uniformly agreed that each town maintains its integrity as a subdivision within such weighted voting schemes. Consequently, it is anomalous for defendants and *amicus* Marchi to argue for an equal vote despite population deviations. At the very least, defendants and *amicus* Marchi must provide a meaningful distinction between the Board scheme and that of boards of supervisors employing weighted votes. See Ex. D.

(4) *The Effectiveness of the Board.*

41. The Board is concededly effective with its present scheme, even though it is regularly and consistently criticized as undemocratic. See, Ex. B, E and F. However, nothing about alternative schemes, such as one with voting power weighted in proportion to population, would diminish the Board's effectiveness. As long as the Board remains small and collegial, and as long as each borough has direct representation on the Board by its borough president, the Board will remain effective. Equal votes among the borough presidents is not a prerequisite for effectiveness. This can be convincingly demonstrated by reference to the towns which participate in the many boards of supervisors around the state. For example, in the Second Circuit's opinion in *League of Women Voters v. County Board of Supervisors, supra,* a system of voting power in which Hempstead has 58 votes and Glen Cove, six was upheld. Presumably, the Board of Supervisors worked effectively, just as the Board of Estimate would if its votes were properly weighted. See Exs. D and E. Under such a system, Staten Island would have a considerably greater percentage of votes compared to Brooklyn, than Glen Cove has, compared to Hempstead in Nassau County. 737 F. 2d at 59. See Ex. E. (SI-3 votes, Brooklyn-16) Thus, the interest in eeffectiveness of the Board does not present a cognizable justification for maintaining voting equality among the boroughs.

(5) *Meaningful Participation by the Lesser Boroughs in Board Affairs.*

42. This asserted interest is the essence of the defendants' and *amicus'* Marchi's arguments. They argue that the State has guaranteed an equal vote for Staten Island in the Board to protect its autonomy as a county, notwithstanding its incorporation into the City of New York. The factual premise for this argument is highly speculative, as is demonstrated above. See ¶¶ 17, 28-32, above. Moreover, the State has specifically excepted the five New York counties whenever powers have been reserved to county governments. See fn. 9 and Ex. C. Moreover, state law amendments to the City charter which have affected Board powers have always been initiated by Charter Revision Commissions at the initiative of City government. State law merely represents a more efficient method for change than popular referendum. And, from 1901 onwards, the State has recognized the City as the source of all local authority in the five county area with respect to each of the primary functions of local government—police, fire, sanitation, local laws, taxes, land-use and all other significant local powers.

43. But even if one assumes that the State intended to preserve the equal vote of Staten Island for the Board, in so far as the Board serves all of the people of New York

City and exercises "general governmental powers over the entire geographic area served," *Avery* v. *Midland County*, 390 U.S. 474, 482 (1968), the State and the Board are constitutionally prohibited from ignoring population deviations unless adequate justifications exist. See Ex. C. Thus, to cite purported state policy in this regard is to beg the question. Notwithstanding any such questionable state policy, adequate justifications must exist to overcome more than minor population deviation. Since it is clear that meaningful representation for the lesser populated boroughs can be achieved without equal votes for each borough, see below, the interest in meaningful representation does not serve as a justification for maintaining the current Board structure.

44. Meaningful representation for the lesser populated boroughs is achieved when their borough presidents have influence and power over Board decisions. Any member who is purely a by-stander will not serve the interest of guaranteeing meaningful representation. To that end plaintiffs have presented the Court with a Board scheme which maintains all of the critical aspects of the current Board in order to serve all of the valid interests that defendants and *amicus* Marchi have identified. The only change in the scheme set forth in Exhibit E is that, instead of equal votes for each borough president, the weight of each vote for the borough presidents is determined by the relative power over Board decisions which the proportion of population in each borough should command under one person, one vote analysis. The relative power is defined by the potential for control over critical votes on the Board.

45. As the Court is aware, most Board issues are decided by unanimous agreement long in advance of final *pro forma* voting. Such decisions are not influenced by the weighted voting scheme described by Ex. E. These are the non-critical votes which are governed by the collegiality and deference inherent in Board procedures. See Ex. D. Critical votes only come into play when collegiality and deference break-down over issues about which no agreement can be reached. A recent example is the controversy over siting the first incineration plant in Brooklyn. See Ex. A. A decision based upon a vote that is 6 to 5, where four borough presidents join one citywide official to constitute a majority, provides one example of a case where each borough president in the majority has a "critical vote." Under the present scheme of equal votes allotted to each borough president, there are 48 voting situations in which critical votes are available to each borough president. Thus, Staten Island and Brooklyn have equivalent influence over Board decisions where a close vote determines the outcome of an issue as opposed to deference, political trading, collegiality or agreement. In these critical voting situations—when "push comes to shove" in government—Staten Island is overrepresented by 285% and Brooklyn is underrepresented by 37% when the number of critical votes controlled by each borough is compared to the relative population of the boroughs. See Ex. E. Thus, Staten Island has far more "meaningful representation" than its population warrants in the very situations where meaningful representation truly counts—critical votes.

46. In order to assure the fair degree of meaningful representation to each borough, the share of control over

critical votes must be adjusted to reflect the proportion of each borough's population. If one begins by retaining the relative power over critical votes between the citywide representatives and the borough representatives—6 to 5—one can assign voting weights appropriate to population. First, in order to avoid fractional voting weights, provide the citywide representatives with 60 votes, and the borough representatives with 50 votes. (Merely multiply each category by 10). Then assign 20 votes each to the three citywide officials. With the remaining 50 votes, a computer search is conducted of the many thousands of possible voting variations and the best results are to assign 16 votes to Brooklyn; 12, to Queens; 11, to Manhattan; 8, to the Bronx; and 3 votes to Staten Island. This distribution of votes results in a total maximum deviation of 7.8%. See Ex. E. For Board actions where the Mayor does not vote, a similar scheme based on sharing critical votes in proportion to population is achievable. See Exhibit E.

47. By alloting votes in this way, control by each borough over critical votes varies in direct proportion to population and relative voting weights reflect population. By guaranteeing a fair share of control in the critical votes, overall meaningful representation is assured for each borough. No borough is a bystander; each has its fair share of critical votes. The knowledge that even the smallest borough—Staten Island—may well make a difference in a several tight voting situations will give that borough meaningful representation in the everyday operations of the Board, when collegiality, deference, and agreement usually determine Board decisions. This conclusion is supported by the Maniscalco affidavit presented in support of *amicus* Marchi's arguments. The former borough

president describes the political reality of representing Staten Island before 1958 when he had only one vote as compared to the two each assigned to each Manhattan and Brooklyn. He recalls:

> "With one vote, I and the Borough Presidents of Queens and Bronx could still individually influence the outcome of a close vote. Furthermore, my opinion and expertise on matters relating to my borough was, I believe, given the same credence and weight by other Board members in their deliberations whether I cast one or two votes when the matter was eventually voted upon. Since I was a meaningful participant able to influence the outcome of a vote [sic].
> Maniscalco Affidavit, ¶ 19.

48. Thus, the interest of assuring "meaningful participation to the lesser populated boroughs in Board affairs" need not be achieved at the expense of one person, one vote compliance. Equal votes for each borough president are simply not necessary to achieve meaningful representation and participation for Staten Island. Therefore, this valid interest does not constitute a justification for deviating from representation based on relative population in the Board scheme.[20]

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[20] The only conceivable one person, one vote objection to weighted voting is not a complaint that defendants or *amicus* Marchi have proffered. Weighted voting schemes fail to provide equal *numbers of representatives* per population base. In other words, an argument can be made that if Staten Island has one representative for its 350,000 people, then Brooklyn ought to have six representatives to serve its 2.2 million people if meaningful representation is to be assured. Plainly, this is not a complaint for defendants or *amicus* whose primary concern seems to be Staten Island. This is a concern of Brooklynites who look to cases such as *WMCA* v.

(footnote continued on following page)

(6) *A Check on Executive Authority.*

49. No doubt the Board's current powers constitute a check on mayoral authority. The simple fact that the City's chief executives all meet and compromise, and that the Mayor can be outvoted, achieves a substantial limitation on the Mayor's powers. See Appendix to Plaintiffs' Motion for Summary Judgment, Documents 6 and 7. However, it is again the case that equal voting among the borough presidents is unnecessary to achieve this interest. As long as the Board as a whole controls substantial executive decisions, it is not critical that each member have an equal vote. As long as each member is meaningfully represented by a vote that can make a difference, the check on executive authority will be accomplished by the Board as a whole. Thus, this interest, like the others cited above, is not served by perpetuating equal voting power for each borough president. Therefore, checking executive authority is not a justification for deviating from strict population equality in voting power.

(footnote continued from previous page)

Lomenzo, 238 F. Supp. 916 (S.D.N.Y.) *appeal dismissed*, 379 U.S. 986, *aff'd*, 382 U.S. 4 (1965) *vacated in part as moot*, 384 U.S. 887 (1966) in which the court held that fractional voting in the state's legislative scheme was unconstitutional. The court, however, expressly reserved the question of whether fractional voting is constitutional at a municipal level of government. Id. at 924, fn. 2. Of course, since *Iannucci* v. *Board of Supervisors, supra*, in 1969, most county boards of supervisors have employed weighted voting schemes. See e.g. *Greenwald* v. *Board of Supervisors, supra; League of Women Voters* v. *Nassau County Board of Supervisors, supra*. The interest in having the same number of legislators per population base conflicts with the legitimate interest in preserving the small size of a Board. Clearly one solution which allows retaining a smal Board in a scheme that combines large and small districts, is a weighted voting scheme as described above. But see Ex. F.

CONCLUSION

50. The sum and substance of the submission of evidence and arguments by the defendants' and *amicus* Marchi is that many reasons exist to respect Staten Island as a county and that direct representation by the borough president on the Board is desirable to achieve this interest. Though plaintiffs dispute a number of defendants' and *amicus*' characterizations of the history and evidence, plaintiffs do not at this juncture dispute these ultimate points. But what is plain from the evidence and arguments of defendants and *amicus* Marchi is that an equal vote for each of the borough presidents is unnecessary to Staten Island's future role on the Board and in the City. Defendants and *amicus* Marchi's arguments for an equal vote on the Board are a blatant appeal for preservation of an outdated, unconstitutional system which guarantees Staten Island overrepresentation that it does not require. This plea contradicts the very arguments the defendants and *amicus* Marchi present concerning the collegial and deferential operations of the Board. Nevertheless, this appeal to the *status quo* is made at the expense of the voting rights of citizens in the larger boroughs who also have a claim on their fair share of the vote.

51. Notwithstanding all of the defendants' claims of political necessities, historical commitments, special needs, integrity of local government, lack of prejudice and so forth, it cannot be forgotten that the preeminent consideration in voting rights cases is the right of each voter to have an equal share of voting power. The unbroken promise of the Supreme Court in this regard has been to assure equal voting power by assuring that "[p]opulation is . . . the starting point for consideration and the controlling

criterion for judgment in . . . apportionment controversies." *Reynolds* v. *Sims*, 377 U.S. 533, 567 (1964). To this end plaintiffs have offered a Board scheme which both respects population and the essence of meaningful participation by the lesser populated boroughs. Since such schemes have been thoroughly tested and analyzed for two decades in the county board of supervisor system in this state and, thus, have been readily available for use by the Board, the defendants cannot be said to have engaged in "a good faith effort to construct districts . . . a nearly of equal population as is practicable." Id. at 577, *see also, Brown* v. *Thomson, supra,* at 77 L. Ed. 2d at 222. In the end, the failure of the current Board scheme to allow for any and all population changes dooms it. Every county system has complied with this fundamental precept. Of course, no deviations this large, by any measure, have ever been tolerated by any courts of which plaintiffs are aware. Certainly, such deviations cannot be tolerated where, as here, no legitimate interest is served by equal votes distributed among unequal population groups.

Dated: April 12, 1985
New York, New York

Respectfully submitted,

/s/ Richard Emery
Richard Emery, Esq.
New York Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 382-0557

Exhibit (D): Annexed to the Affirmation of Richard Emery

UNITED STATES DISTRICT COURT

Eastern District of New York

81 Civ. 3290 (ERN)

Beverly Morris, et al.,

Plaintiffs,

—against—

Board of Estimate, et al.,

Defendants.

Affidavit of Lee Papayanopoulos

I, Lee Papayanopoulos, being duly sworn upon oath, depose and say as follows:

1. I am the Director of Information Technology and Senior Research Scholar and Adjunct Professor at the Business School of Columbia University as well as Associate Professor of Quantiatative Studies at Rutgers University. My complete vitae is attached hereto.

2. For the last seventeen and a half years, I have been retained by between 30 and 40 county boards of supervisors in New York State to compute voting weights which are then assigned to town representatives in order to comply with one person, one vote structures as set forth by the New York Court of Appeals in *Ianucci* v. *Board of Supervisors,* 20 N.Y. 2d 244, 282 N.Y.S. 2d 502 (1967). I undertake these computer analyses by comparing the relative

populations of the various towns which comprise a county board of supervisors and then I search for weighted votes which provide each town a percentage of the total decisive voting combinations which most closely reflects each town's proportion of the county's population. In this way voting power for each town's representative is closely adjusted to each town's population in the overall county scheme.

3. I have recently discussed a weighted voting scheme for the Board of Estimate with Professor Steven Brams of New York University and have reviewed the results of his computer search for appropriate weighted votes. Given the desirability of finding a simple scheme which provides minimal deviations for voting situations with and without the Mayor's participation in voting, I believe that Professor Brams' scheme is a good one. It has the advantage of maintaining identical weighted votes whether a 110 vote or 90 vote Board is voting. If this aspect of the scheme were to be abandoned and different weights assigned for each voting scheme, it is likely that even lower deviations could be achieved.

4. In general, in designing weighted voting schemes for county boards of supervisors I have achieved total extreme relative deviations of about 4%. Generally, the New York State courts require a total relative deviation that is as small as practicable based upon a thorough computer search.

5. The Board of Estimate presents no difficult problems for designing a weighted voting scheme. It can be treated just like any of the many county boards of supervisors that rely on weighted voting schemes. The fact that the Board of Estimate is dominated by the three citywide

officials does not change the fact that the borough presidents are the local representatives of their constituencies which vary dramatically in population size. The fact that these local representatives must come together, interact, compete for the attention of the citywide officials and ultimately vote on issues, means, under one person, one vote doctrine, that their voting power like county boards of supervisors, may be apportioned in proportion to population. Of course, the current Board of Estimate does not respect population variations among the boroughs, just as many county boards of supervisors did not respect population variations among towns before 1967.

6. In conjunction with preparing this affidavit I reviewed the papers submitted by defendants and *amicus* Marchi asserting numerous interests alleged to justify the huge voting dilution perpetuated by the current Board of Estimate scheme. These justifications fall into six categories: (1) historical factors, (2) natural boundaries; (3) integrity of political subdivisions; (4) effectiveness; (5) meaningful participation of the lesser populated municipal entities; and, (6) a check on executive power. It is notable that these very interests are the same interests which are of substantial concern to the participants in most of the schemes I have designed for county boards of supervisors. The towns which comprise New York's counties each have their own history, boundaries, integrity, desire for a voice, need not to be dominated and desire to have effective county government. County government is the primary building block of state government under the New York State Constitution. County government determines how each of the towns within a county will fare. County government predominates over town government as the primary

base of local governing authority. Thus, every town has an overriding concern that county government will respect its special needs and integrity.

7. The way this is accomplished is by means of a weighted voting scheme. Weighted voting schemes parcel out voting power to towns in a manner that guarantees each town its fair share, its voice on the critical votes. Because every town representative knows that he or she has a meaingful share of the critical votes, deference and collegiality develop which usually avoid close (critical) votes. But when critical votes do occur every town knows that its voice means something.

8. As I understand it, this is exactly the situation which exists in the present Board of Estimate except that Staten Island and the Bronx have far more than their fair share of voting power. Under the circumstances described by the defendants and *amicus* Marchi, I can see no good reason not to institute a weighted voting scheme such as that which is employed by county boards of supervisors (e.g. Professor Brams' scheme), which respects all of these special interests. Such a scheme is, in my opinion, the most rational method of achieving democratic representation for small districts which must co-exist with large districts within a governing body. I have prepared just such plans on many occasions for more than half of the counties in New York State.

/s/ LEE PAPAYANOPOULOS
LEE PAPAYANOPOULOS

Sworn to before me this 10th day of April, 1985.

/s/ RICHARD EMERY
Notary Public

Exhibit (E): Annexed to the Affirmation of Richard Emery

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81 Civ. 3290 (ERN)

BEVERLY MORRIS, et al.,

Plaintiffs,

—against—

BOARD OF ESTIMATE, et al.,

Defendants.

AFFIDAVIT OF PROFESSOR STEVEN J. BRAMS, AND APPENDIX: ALTERNATIVE VOTING SYSTEMS

I, Steven J. Brams, being duly sworn upon oath, depose and say as follows:

1. I am a professor in the Department of Politics at New York University. I have offered my opinions and expertise in this case previously, and this Court has referred to my views in its August 21, 1984, opinion in this case. My previous affidavit and my vitae are included in plaintiffs' Appendix in support of their motion for summary judgment.

2. At the request of plaintiffs' counsel, I and a colleague, Dean Paul J. Affuso of the New York University Graduate School of Business Administration, undertook an extensive computer search for the optimal weighted votes which

could be assigned to each of the borough presidents in order to provide each borough president with a proportion of "critical votes" (situations in which that borough president's votes can change the outcome) commensurate with the population of that borough.* Our computer search turned up thousands upon thousands of possibilities. We chose a set of weights and a voting decision rule that reflects the current Board of Estimate scheme better than any other that we examined, based on an exhaustive search defined by the assumptions given in paragraphs 3 and 6 below.

3. By giving the citywide representatives 20 votes each for a total of 60 votes, and the borough presidents a total of 50 votes (in order to avoid fractional votes), and assigning a decision rule requiring 58 (out of a total of 110) votes to win (a bare majority of 56 votes does not provide an optimal fit), the best-fitting voting weights, with voting-power percentages and deviations from population percentages, are the following:

* For technical definitions of this measure of voting power (due to John F. Banzhaf, III) and related measures, and efficient algorithms for computing voting power, see [2], which is reference 2 in the List of References in the Appendix to this Affidavit that gives full citations of the sources used. See also [3] for a recent application of the Banzhaf measure to weighted voting in the European Community Council of Ministers.

Borough	Voting Weight	Population % (1983 estimates)	Banzhaf Voting Power %*	Relative Deviation from Optimal Power**
Staten Island	3	5.2	5.3	+1.2
Bronx	8	16.3	15.8	−3.1
Manhattan	10	20.1	21.1	+4.7
Queens	13	26.6	26.3	−2.2
Brooklyn	16	31.5	31.6	0.0
Total	50	100%	100%	

4. Under this scheme, each citywide member will have 20 votes, giving each 18.9% of all critical votes (percent of voting power). The voting power of the three citywide members totals 56.8%. The five borough presidents with 50 votes have total voting power of 43.2%

5. As is clear from the above table, each borough president controls a percentage of critical votes virtually proportional to the population he or she represents. The maximum relative deviation between the most overrepresented and underrepresented boroughs is 7.8% (4.7% + 3.1% for Manhattan and the Bronx, respectively) from absolute population proportionality.

6. For a 90-vote board, without the Mayor participating, a similar scheme is possible using exactly the same voting weights for each borough and employing a 48-vote decision rule (48 votes required to win instead of 58 in the 110-vote board). This scheme gives the following results:

* The Banzhaf Voting Power % of a particular representative is simply the percent of all situations in which that particular representative can cast a critical vote.

** Relative Deviation from Optimal Power is the difference between the voting power and population percentages, divided by the population percentage and multiplied by 100. (For Staten Island, for example, this difference is $5.3 - 5.2 = 0.1$, divided by 5.2, which is 1.2% after rounding of exact values.

Exhibit E Annexed to the Affirmation of Richard Emery

Borough	Voting Weight	Population % (1983 estimates)	Banzhaf Voting Power %	Relative Deviation from Optimal Power
Staten Island	3	5.2	4.8	— 8.4
Bronx	8	16.3	14.3	— 12.4
Manhattan	10	20.1	20.6	+ 2.7
Queens	13	26.9	27.0	+ 0.3
Brooklyn	16	31.5	33.3	+ 5.8
Total	50	100%	100%	

7. In the 90-vote board (without the Mayor), the two citywide officials have 47.9% of the voting power (24.0% each), and the five borough presidents have 52.1% of the power. The maximum relative deviation between the most overrepresented and underrepresented boroughs is a rather high 18.2% (5.8% + 12.4% for Brooklyn and the Bronx, respectively). Given the rarity of the 90-vote scheme and the appeal of simplicity in maintaining the same voting weights for both the 110-vote and 90-vote scheme, perhaps this relative deviation is tolerable. More fundamentally, however, it appears that *no* weighted voting assignments, giving equal weights to the two citywide officials greater than any of the five borough presidents, can give a better fit.

8. I have thoroughly reviewed the most recent affidavits and exhibits submitted to the Court by the defendants and *amicus* Marchi. I have especially reviewed the asserted interests in historical factors, natural boundaries, integrity of political subdivisions, effectiveness of the Board, meaningful participation in Board affairs by the less-populous boroughs, and limiting executive authority. I do not agree that any of these interests should take precedence over a fair, democratically based representative system.

Exhibit E Annexed to the Affirmation of Richard Emery

9. To this end, I describe herewith in the Appendix to this Affidavit three alternative voting systems giving the larger boroughs more representatives rather than votes, any one of which I believe would far better serve all the citizens of New York than the present Board scheme. Each seems to me a system competitive with the weighted-voting scheme recommended herein and therefore should be considered a serious candidate in future deliberations about possible reforms of the present board.

10. It is clear that equal votes for each of the borough presidents is untenable for achieving the interests the defendants and *amicus* Marchi have identified. Equal votes for each borough president is merely an arbitrary "weighted" voting scheme—assigning 20% of voting power to each borough president—that is not reflective of borough population differences and does not respect any measure of voting power in relation to population. Such a scheme changes the "one-person, one-vote rule" into a "one-county, one-vote" rule. Under a Banzhaf weighted-vote analysis, the present system produces a relative-deviation overrepresentation of 285% for Staten Island and a relative-deviation underrepresentation of 37% for Brooklyn. By any standard, these are unacceptable deviations from a proper distribution of voting power intended to mirror the population differences.

/s/ Steven J. Brams
Steven J. Brams

Sworn to before me this 9th day of April, 1985.

/s/ Name Illegible
Notary Public

Exhibit E Annexed to the Affirmation of Richard Emery

APPENDIX: ALTERNATIVE VOTING SYSTEMS

Instead of weighting the votes of borough presidents to give them voting power commensurate with the borough populations, one could assign representatives to each borough roughly in proportion to their populations. For example, if Staten Island is used as the standard for a district and given one representative, each borough would receive the following numbers of representatives:

	Representatives
Staten Island	1
Bronx	3
Manhattan	4
Queens	5
Brooklyn	6
Total	19

A simply majority of 10 out of 19 could be used to enact bills in such a legislature. Such a body could be expanded to include at-large members, such as the three citywide officials (Mayor, Comptroller, and City Council President), with one or more of these officials given certain prerogatives, such as a veto. But for purposes of the subsequent discussion, a legislature of 19 members will be assumed.

Three different systems for the election of representatives might be considered and will now be briefly described.

1. Adjusted District Voting

Each borough would be divided into equal-size districts (except for Staten Island), and each voter would be able to vote for one representative (or more under "approval

Exhibit E Annexed to the Affirmation of Richard Emery

voting"; see system 3 below for a description of this kind of voting). The candidate with the most votes in each district would win.

In order to ensure that different *interests* are represented citywide, each candidate would be required to run as a nominee of one political party, which could include the traditional political parties as well as any new parties that might form that meet certain minimum requirements (e.g., petition signatures, campaign funds raised, etc.). Thus, for example, parties might form along different ethnic, racial, or religious lines, or on substantive issues such as educational reform, environmental controls, and so on.

If any party's candidates received *in toto* (i.e., across all boroughs) more than some minimum percentage of the citywide vote (perhaps 5 or 10 percent), but it won a smaller percentage of seats, it would be entitled to additional representatives up to—but not to exceed—the percentage of its citywide vote. This adjustment would occur after the district elections. (Such adjustments are allowed in Puerto Rico under specified conditions; in West Germany and other West European countries, adjustments involve adding a fixed—not variable, as recommended here—number of representatives on the basis of the national vote.) Representatives of each underrepresented party would be added to the winning candidates already elected from each of the 19 districts to increase the size of the legislature.

But such a variable-size legislature, under certain conditions, might create incentives for a party to "throw" district elections because it could benefit more from adjustments after the election ([6]; [7]). These incentives can

be eliminated by placing certain limits on the number of representatives that can be added in the adjustment phase.

A test of this system in the 1983 British general election, wherein the Alliance of the Liberal Party and the Social Democratic Party won 25.3% of the national vote but only 3.5% of the Parliamentary seats (it came in second in many Conservative and Labor districts), showed that the Alliance could be given a total of 21.1% of the seats in an enlarged Parliament before such an incentive would develop. This adjustment would have brought it rather close to its proportion of the national vote (25.3%), giving the interests of its supporters much greater representation than they received in the district elections (3.5% see [7] for details).

2 Limited Voting in Each Borough

Each borough would be given the number of seats indicated above but there would be no districts within each borough. Each voter could vote for exactly one candidate in his or her borough, and those candidate(s) with the most votes would win. This system of limited voting, which is used in the United States, Japan, and other countries, would allow smaller parties to win one or more seats in the larger boroughs if their supporters concentrated their votes on one (or a very few) candidates.

Limited voting contrasts with a system in which voters in each borough can vote for as many candidates as there are seats to be filled, which would permit a majority (or plurality) party to win all the seats because minorities, even by concentrating their votes on one candidate, could not overcome the votes that a majority (or plurality) could place on each of its candidates for all seats. Unlike adjusted district voting, however, voters would not have their

"own" representative (except in Staten Island, where there is only one) because representatives would be borough-wide.

3. Successive Approval Voting

Approval voting is a voting system in which voters can vote for as many candidates as they wish in an election with more than two. In single-winner elections, it tends to elect the strongest candidate overall (i.e., the one most approved of), whereas plurality voting—vote for exactly one candidate—frequently elects the strongest minority candidate in a crowded field ([1]; [4]; [5]).

But when electing a legislature, approval voting would not seem a good voting procedure. This is because a majority or plurality party by voting for all its candidates, can elect all of them—or at least as many as there are seats to be filled—and the minority will go unrepresented.

Assume, however, that approval votes are counted in the following manner:

Round 1. The candidate with the most votes wins the *first seat*. The approval ballots of all voters who voted for this candidate are *discarded*, for these voters have gotten at least one (approved) representative elected.

Round 2. The candidate with the most votes on the approval ballots that remain wins the *second seat*, and the ballots of those who voted for him are discarded.

Subsequent rounds. Seats are successively filled, and ballots discarded, until all seats are filled. [Should all ballots be discarded before all seats are filled, each voter will have at least one (approved) representative, and the remaining seats might be filled by seating the highest-ranking

candidates on the first round who were not already elected.]

Successive approval voting (SAV)

I. *Maximizes* the number of voters who have one or more (approved) representatives in the legislature;

II. *Encourages* sincere *bullet* voting, because this strategy best ensures that a candidate's single best candidate will be elected—provided that this candidate's "electability" is perceived to be the same as that of all other candidates.

Since there are as yet no published articles on SAV, it is worth describing some of its implications in greater detail than either of the previously described systems. First, there are at least two qualifications to II above:

1. If one's best candidate is perceived to be a *dark horse,* a voter might do better by voting for less preferred but more electable candidates *in addition* so as to maximize the probability of electing at least one acceptable candidate;

2. If one's best candidate is perceived to be the *front-runner,* a voter might do better by voting for less-preferred candidates *instead* so his ballot will not be discarded after the front-runner is elected and thereby he may help elect still other acceptable candidates. (Of course, if everyone reasons this way, the front-runner may lose his front-running status and consequently may not be elected.)

It would appear that SAV is "monotonic," because approving of a candidate can never hurt him or her. Interestingly, though, "twins" who share approval votes may be hurt. For if A has a twin B, and all voters who vote for B also vote for A, then a focal voter who votes for just

A when no other voters do will elect A when A and B are tied with the most votes. But this will eliminate B since all approval ballots on which B is supported will be discarded when A's ballots are discarded.

SAV may be complicated by allowing for the transfer of "surplus votes," round by round, as under the Hare system of single transferable vote (STV) ([8]; [9]). Thus, for example, if A beats B by a 3-to-2 margin on the first round, instead of discarding all ballots on which A is approved, these ballots would be retained but each approval vote on them would be discounted by ⅔—under the assumption that each A supporter needed to expend only ⅔ of his on her approval votes to elect A over B on the first round Thereby, all approval votes on A-supporter ballots would count as ⅓ of a vote on the second round, and similar discounting—including discounting of already discounted ballots—would occur round by round.

This discounting would mean that voters who supported a candidate who is elected on any round would still be able to influence subsequent choices (with discounted votes) if the candidate who won on this round won with a surplus of votes. No voter, of course, would ever be able to expend more than one full vote on the entire set of candidates who is elected. On the other hand, voters who approved of no candidates who were elected would expend no votes and hence not directly influence the outcome, though they might have indirect influence through their effect on surplus votes, which are a function of what (next-best) losing candidates receive.

The advantage of transferring surplus votes is that a voter can directly influence the selection of more than one candidate rather than having his influence terminated after only one candidate he approves of is elected. This fact

should diminish his or her need to make strategic calculations generally, and discourage bullet voting in particular (if this voter finds several candidates acceptable). Its disadvantage is the complications of transfers and discounting, which, judging from experience with STV, few will understand.

Summary

Adjusted district voting has the advantages of giving voters their own representatives (from districts) and giving party interests approximate proportional representation. Its disadvantage is that it will inevitably generate controversy over the drawing of district lines in all boroughs except Staten Island. Under limited voting, voters in the four larger boroughs would not have their own representatives, but minority candidates could get elected. They also could under successive approval voting, in which voters can better express themselves by voting for more than one candidate in a borough, but it is harder to understand and would require computerization of vote counting to be feasible.

All the above systems give voters in the larger boroughs more representatives, not more votes (as under weighted voting). This is advantageous if it is felt that one person from these boroughs cannot adequately represent the entire interests of the borough.

LIST OF REFERENCES

1. Brams, Steven J. "Approval Voting: A Practical Reform for Multicandidate Elections." *National Civic Review* 68, no. 10 (November 1979): 549-553, 560.
2. Brams, Steven J., and Paul J. Affuso. "Power and Size: A New Paradox." *Theory and Decision* 7 (March 1976): 29-56.
3. Brams, Steven J., and Jaul J. Affuso. "New Paradoxes of Voting Power on the EC Council of Ministers." *Electoral Studies* (forthcoming 1985).
4. Brams, Steven J., and Peter C. Fishburn. "Approval Voting." *American Political Science Review*, 72, no. 3 (September 1978): 831-847.
5. Brams, Steven J., and Peter C. Fishburn. *Approval Voting*. Boston: Birkhäuser, 1983.
6. Brams, Steven J., and Peter C. Fishburn. "A Note on Variable-Size Legislatures to Achieve Proportional Representation," in *Choosing an Electoral System: Issues and Alternatives*, ed. Arend Lijphart and Bernard Grofman. New York: Praeger, 1984, pp. 175-177.
7. Brams, Steven J., and Peter C. Fishburn. "Proportional Representation in Variable-Size Legislatures." *Social Choice and Welfare* 1 (1984): 211-229.
8. Brams, Steven J., and Peter C. Fishburn. "Some Logical Defects of the Single Transferable Vote," in *Choosing an Electoral System: Issues and Alternatives*, ed. Arend Lijphart and Bernard Grofman. New York: Praeger, 1984, pp. 147-151.
9. Fishburn, Peter C., and Steven J. Brams. "Some Paradoxes of Preferential Voting." *Mathematics Magazine* 56, no. 5 (September 1983): 207-214.

Reply Affidavit of John J. Marchi, Read in Support of the Continuation of the Present Structure of the Board of Estimate, dated April 19, 1985

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81 Civ. 3290 (ERN)

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPUSTIL,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, CAROL BELLAMY, as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, ANDREW STEIN, STANLEY SIMON, DONALD MANES, RALPH LAMBERTI, each individually and as Borough Presidents of the Boroughs of the City of New York,

—and—

FRANK V. PONTERIO,

Intervenor-Defendant,

ROBERT A. STRANIERE, individually and as a member of the New York State Assembly,

Intervenor-Defendant.

Reply Affidavit of John J. Marchi

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

JOHN J. MARCHI, being duly sworn deposes and states:

1. I submit this Reply Affidavit in order to clarify and highlight some of the statements made in my Affidavit and in the supporting Affidavits annexed as exhibits to my Affidavits which were previously submitted to this Court and which have been referred to, and in some instances, misinterpreted in the Affirmation of Richard Emery and the Affidavit of Alan Rothstein.

2. The Affidavit of Loring McMillen traces the period leading up to Richmond County's entry into Greater New York in 1898 and concludes that:

> "the citizens and officials of Richmond County of the late 1890s would never have chosen to give up their own county form of government or their plans to pursue an independent city form of government if they knew, or even suspected that they or their successors would not have a meaningful voice in the major decisions that affected their county."
>
> (McMillen Affidavit ¶ 19, *see also* Marchi Affidavit ¶¶ 10-11)

Mr. Emery not only concedes the validity of the argument that Staten Island would never have chosen to consolidate unless its citizens believed they would have meaningful representation in New York City governance, he states that it is a position with which "of course plaintiffs do not disagree." (Emery Affirmation ¶ 30). Mr. Rothstein takes exactly the opposite position, stating that "any notion that

this argument has validity must be put to rest . . . with absolutely nothing in the record of the case support[ing] the argument." (Rothstein Affidavit ¶ 26). Mr. Rothstein further states that there is no evidence that Staten Islanders understood that the borough would have any power over its affairs out of proportion to its population. In fact, citing the Trautmann Affidavit, he concludes that "in all probability obtaining a disproportionate share of power was not their major concern." (Rothstein Affidavit ¶ 29) Neither the McMillen Affidavit nor the Marchi Affidavit (nor any Affidavit submitted in support of the defendants' position) states that the Staten Islanders of 1898 had as a major concern obtaining a disproportionate share of power. However, as is pointed out in both the McMillen Affidavit (¶¶ 11-12, 15-16) and the Marchi Affidavit (¶¶ 7-12), the people of Richmond County gave up their own county form of government in which they were directly responsible for electing the officials who made the determinations which impacted upon their county, and also gave up their plans to pursue the route of adopting their own city form of government, in order to become part of New York City. It is illogical to suggest that such action would have been taken if it had been anticipated that major decisions affecting their county could be made over which they would have no control. Indeed, the McMillen Affidavit, quoted above, states that such action in favor of consolidation would never have been taken if the result urged by the plaintiffs in this case was anticipated.

3. Both the Emery Affirmation (¶ 32) and the Rothstein Affidavit ¶¶ 8, 12) take a portion of a statement concerning the pre-1958 Board structure in the Maniscalco Affidavit out of context and leave out the critical

conclusion of that statement. Both Emery and Rothstein quote from a few sentences of Mr. Maniscalco's statement (Maniscalco Affidavit ¶ 19) in which he states that before 1958, when the Borough Presidents of Staten Island, Bronx and Queens had only 1 vote on the Board (as compared to 2 votes for the Borough Presidents of Brooklyn and Manhattan and 3 votes for the Citywide Officials), he was a meaningful participant in the Board's deliberations. From this, they (Emery and Rothstein) conclude that if the Board's voting structure is changed on a pure population basis, the Borough President of Staten Island would still be a meaningful participant. This is directly contradicted by the last sentence in that same paragraph 19 of the Maniscalco Affidavit in which he states "if, however, I only had 1/6th of a vote, I would have no meaningful presence and would not have, I believe, been treated as a credible Board member."

The Emery/Rothstein conclusion is also contradicted by the plaintiff's own expert who previously stated in material submitted to this Court that if the Board of Estimate is reapportioned according to borough population, Staten Island's Borough President would be "a mere observer in the Board's deliberations" (Kramarsky "The Structure, Powers and Functions of New York City's Board of Estimate," *see* p. 27 Marchi *Amicus* brief).

The Emery/Rothstein conclusion is also disputed by a simple look at the number of votes cast by the pre-1958 Board members and the number of votes which would be cast under the weighted voting scheme urged by the plaintiffs. Before 1958, the Borough Presidents of Staten Island, Bronx, and Queens each cast 1 vote, out of a total of 16 votes, on the Board. With each Citywide Official casting 3 votes and the other 2 Borough Presidents casting

2 votes each, there are numerous grouping of officials in which that 1 vote of Staten Island, Bronx or Queens could make a difference in the outcome. As a corollary to that, Brooklyn and Manhattan with its 2 votes each could make a difference in the outcome but could not operate to automatically discount any vote of the smaller boroughs. This is certainly not the case in the result urged by the plaintiffs in our instant case. Here, as outlined in the Emery Affidavit (¶ 46) and in the Brams Affidavit (¶¶ 3-7), Staten Island would have a total of 3 votes out of 110 votes cast, with no possible way to influence any vote. Brooklyn, on the other hand, with its 16 votes could, by casting its votes with 2 Citywide Officials, make up a majority of the votes. Despite the statement of Mr. Emery that such a voting structure does not result in making the Staten Island Borough President a "by-stander," the numbers clearly show that the opposite is true. Mr. Emery concedes the necessity of the Staten Island Borough President's vote being "viewed as potentially critical" (¶¶ 31-32) and unequivocally states that "any member who is purely a by-stander will not serve the interest of guaranteeing meaningful representation." (¶ 44) This, I believe, is precisely the point.

4. The Rothstein Affidavit makes reference to the statements in various Affidavits that a meaningful role of the Borough President on the Board of Estimate has heightened with importance as the powers of the Borough Presidents have been diminished (¶¶ 38-39). While Mr. Rothstein does not dispute the accuracy of the notion that the Borough President's powers have been greatly diminished in this century (in fact he states at ¶38 that the 1938 and 1963 Charter substantially reduced the role of borough government), he states that there has been no *quid pro quo* in reducing borough government and increasing the

power of the Board (¶ 35). None of the Affidavits I submitted advance the theory of such a *quid pro quo*—rather, as I, Maniscalco and McMillen point out, with the decrease in the role of borough government has come an increase in the importance to the people of the individual boroughs or having meaningful representation on the Board of Estimate which makes such vital decisions impacting upon their boroughs (Marchi Affidavit ¶ 18; McMillen Affidavit ¶ 17; Maniscalco Affidavit ¶ 24).

5. Both Mr. Emery and Mr. Rothstein discuss in their submissions the arguments advanced in the Marchi Affidavit and Straniere Affidavit concerning the rights possessed by the counties throughout the State. (Emery Affimation ¶¶ 19-22; Rothstein Affidavit ¶¶ 30-32), with both gentlemen missing the central point. In my previous affidavit (¶¶21-25), *Article IX of the Constitution* which contain the "Bill of Rights for Local Government" is discussed. This "Bill of Rights" recognized that the "expansion of power for effective local self government is a purpose of the people of the state," and provided "guarantees against impairment of the powers of one municipality by the exercise of local legislative powers by another" (Marchi Affidavit ¶ 22). This "Bill of Rights" specifically excluded the counties wholly included within a city (the 5 counties of New York City are the only such counties in the State) not to carry out a legislative intent to deprive the people of those counties of their rights to effective local self government but in recognition of the uniqueness of the City of New York (*see* Jaffe Affidavit) and in full cognizance of the fact that governmental structure of the City provided each county with a meaningful role in their governance. As previously stated I am convinced that

Reply Affidavit of John J. Marchi

"if the result the plaintiffs are advocating in this lawsuit was anticipated by state officials in the early 1960s, this statute would never have been passed without the inclusion of safeguards for the self governance of all sixty-two counties, including the five counties of New York City."

6. Based upon the foregoing, and all the papers previously submitted, I respectfully request that this Court find that there are sufficient policies and interests to justify the continuation of the present structure of the Board of Estimate.

Dated: April 19, 1985

/s/ John J. Marchi
John J. Marchi

Sworn to before me this 19th day of April, 1985.

/s/ Patricia E. Perez
Notary Public

Affirmation of Susan R. Rosenberg, Read in Reply to Some of the Points Raised by Plaintiffs and Defendants' *Amicus Curiae*, dated April 22, 1985

UNITED STATES DISTRICT COURT

Eastern District of New York

81 Civ. 3290 (ERN)

Beverly Morris, et al.,

Plaintiffs,

—against—

The Board of Estimate, et al.,

Defendants.

—and—

Frank V. Ponterio,

Intervenor-Defendant,

—and—

Robert A. Straniere, etc.,

Intervenor-Defendant.

Susan R. Rosenberg, an attorney duly admitted to practice in the courts of the State, affirms to the truth of the following under penalty of perjury:

1. I am an Assistant Corporation Counsel in the office of Frederick A.O. Schwarz, Jr., Corporation Counsel of the City of New York, attorney for defendants (other than intervenor-defendants). I am fully familiar with the facts

and circumstances of this action and make this affirmation in reply to some of the points raised by both plaintiffs and *amicus curiae* Citizens Union. Specifically, defendants address the comments made as to remedy.

2. The first point to be made is that all this discussion is premature and, we submit, inappropriate. The issue before the Court is not remedy, but the underlying merits. On that, there are serious issues, in our view, with respect to whether the Court properly ignored the effect of the three City-wide members in making its finding of malapportionment, and with respect to justification. In any event, as the Court will remember from *Andrews* v. *Koch,* 528 F. Supp. 246 (E.D.N.Y. 1981), *aff'd,* 688 F. 2d 815 (2d Cir. 1982), the appropriate—and regularly employed—procedure in the event a final judgment is reached by the courts that a governmental body violates the one person, one vote doctrine is to give the local authority an opportunity to consider alternatives and come up with a plan. *Wise* v. *Lipscomb,* 437 U.S. 535, 539 (1978); *Connor* v. *Finch,* 431 U.S. 407, 414-415 (1977); *Chapman* v. *Meier,* 420 U.S. 1, 27 (1975); *Gaffney* v. *Cummings,* 412 U.S. 735, 749 (1973). Judicial relief becomes appropriate only when the locality fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so. *Reynolds* v. *Sims,* 377 U.S. 533, 586 (1964). This is because local governmental bodies are the institutions that are the best situated to identify and then reconcile traditional state policies within constitutional mandates. *Connor* v. *Finch, supra* at 415.

3. During the course of this case, plaintiffs have jumped from scheme to scheme, starting with the idea that there

should be a wholly new body with substantial additional members to replace the Board of Estimate. This received a negative reaction as expensive, cumbersome and essentially duplicative of the City Council. Now, plaintiffs are primarily stressing a weighted voting scheme in which the boroughs remain the representative districts and the membership of the Board remains the same, but in which the borough representatives are assigned a number of votes in proportion to their boroughs' respective population. But the weighted voting concept that plaintiffs now seem to prefer illustrates the underlying fallacy of ignoring the three City-wide members. What plaintiffs propose is that the votes of the borough presidents be weighted so that the Brooklyn representative would have 16 votes and then the others be scaled down to 3 for Staten Island. But in doing so, plaintiffs, once again, completely ignore the relationship between the borough members and the City-wides. Thus, plaintiffs would leave each City-wide member with 20 votes. Does it really make sense that one borough president, representing 31.5% of the City's population, should have 80% of the voting power of the Mayor, Comptroller and City Council President, all of whom have been elected by the City as a whole? This just highlights, in our view, the error in ignoring the three City-wide members of the Board in deciding if there is malapportionment in the first place.

Dated: April 22, 1985
New York, N.Y.

/s/ Susan R. Rosenberg
Susan R. Rosenberg

Affirmation of Susan R. Rosenberg

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

SUSAN R. ROSENBERG, being duly sworn, says that on the 22nd of April, 1985, she served the annexed Affirmation upon the attorneys for the respective parties as listed below, by depositing a copy of the same, enclosed in a postpaid wrapper in a post office box in the Borough of Manhattan, City of New York.

Richard Emery, Esq.
Attorney for Plaintiffs
New York Civil Liberties Union
132 West 43rd Street
New York, New York 10036

Frank V. Ponterio, Esq.
Intervenor-defendant *pro se*
766 Pelton Avenue
Staten Island, New York 10310

Hon. Robert A. Straniere
Intervenor-defendant *pro se*
182 Rose Avenue
Staten Island, New York 10306

Hon. John Marchi
Amicus Curiae
358 St. Mark's Place
Staten Island, New York 10301

Affirmation of Susan R. Rosenberg

Alan Rothstein, Esq.
Amicus Curiae
198 Broadway
New York, New York 10038

/s/ SUSAN R. ROSENBERG
SUSAN R. ROSENBERG

Sworn to before me this 22nd day of April, 1985

/s/ ELISE WINTERHOFF
Notary Public

Reply Affidavit of Robert A. Straniere, Read in Support of the Present Voting Structure and Allocation of Seats on the Board of Estimate, dated May 2, 1985

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81 Civ. 3290 (ERN)

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, CAROL BELLAMY, as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, ANDREW STEIN, STANLEY SIMON, DONALD MANES, RALPH LAMBERTI, each individually and as Borough Presidents of the boroughs of the City of New York,

Defendants,

—and—

FRANK V. PONTERIO,

Intervenor-Defendant,

ROBERT A. STRANIERE, individually and as a member of the New York State Assembly,

Intervenor-Defendant.

Reply Affidavit of Robert A. Straniere

STATE OF NEW YORK,
COUNTY OF NEW YORK, SS.:

ROBERT A. STRANIERE, a member of the New York State Assembly and an attorney duly licensed to practice law in the State of New York, being first duly sworn, deposes and says:

1. I am an Intervenor-Defendant in the above-entitled matter and I am fully familiar with the facts and circumstances of this action. I submit this Reply Affidavit in response to Affidavits filed on behalf of the plaintiffs and *amicus curiae* Citizens Union.

2. Clearly, one of the fundamental principles upon which our nation and government was founded is that of equality of right. This principle is articulated within the Equal Protection Clause of the Fourteenth Amendment and it is this element of our Constitution which provides the underlying basis of the plaintiff's action.

3. It is equally clear, however, that the Equal Protection Clause was never intended to restrain the normal exercise of governmental power, but only *abuse* in the exercise of such authority. *Louisville & Nashville Railroad Co.* v. *Melton*, 218 U.S. 36 (1910) (emphasis added). The Equal Protection Clause requires not that a state never distinguished between citizens, but only that the distinctions that are made not be *arbitrary* and *invidious*. *Avery* v. *Midland County*, 390 U.S. 474 (1968) (emphasis added). It is for these very reasons that this Court has been directed to consider not just the level of deviation from population equality that may exist within the voting structure on the Board of Estimate, but also, to consider those

State policies and interests which the United States Supreme Court has held may justify such deviation.

4. The underlying issue in this action is not one grounded upon some alleged abuse in the exercise of governmental authority. In fact, plaintiffs have previously acknowledged that the membership and voting structure of the Board of Estimate was not created by some arbitrary and invidious exertion of governmental authority, but instead, was intended "to effect compromise between local and citywide interests by seating together borough and citywide officials." *See* Plaintiffs' Memorandum of Law in Support of Their Motion for Summary Judgment, dated December 16, 1983, at p. 4. The plaintiffs have also agreed that the current makeup of the Board has, at least in the past, advanced several State policies and interests including the "ability to balance differing interests and needs, and to accommodate development and long-term planning requirements of both the boroughs and the City as a whole." *See* "Joint Stipulation of Policies and Interests Served by the Board of Estimate, dated October 18, 1984, at p. 7. But while the plaintiffs do not dispute the fact that the Board "is needed" and "it works," specifically pointing out that "the Board serves its function well," *see* paragraph #5, *Affidavit of Richard Emery*, plaintiffs take the position that a Board structured to comply more strictly to a one person, one vote formula could just as well serve its purposes, if not better.

5. I am not unmindful of the possibility that there may be "better" alternatives in the governing of a unique and diversified City of New York. It is the nature of our society to seek to develop legally acceptable changes and

"better ways" to achieve a goal or produce a better product. Along these lines, I myself proposed that the State Legislature study possible alternatives to the structure of government in New York City in June of 1983, immediately following the ruling by the Second Circuit that the one person, one vote principle applied to the City's Board of Estimate. At that time, I had prepared for introduction legislation that directed the creation of a ten-member, bi-partisan legislative commission empowered to make a comprehensive review of the possible options for change in the structure of government within the City. Similar legislation has been introduced during this 1985 Legislative Session. But whether or not there exists alternatives to the governance of our City is also not an issue that is before this Court at this time. The sole question that remains to be decided is whether the policies and interests that have been put forward in papers submitted by and on behalf of the defendants can justify the degree of deviation this Court has determined exists on the Board.

6. Throughout my participation in this litigation, I have argued from a State policy standpoint. It is not just simply that Staten Island's interests will not be represented if a strict one person, one vote formula is applied to the Board of Estimate. To some extent, Bronx County will suffer a similar diminution of representation on the Board. The point is that a rational State policy of blending local and citywide interests, which all parties have agreed is effectuated by the Board's current membership and allocation of voting power, will be effectively eliminated if any of the number of proposed alternatives advanced by the plaintiffs is implemented.

7. Mr. Emery has done a good job of exaggerating my arguments by addressing them as if they were independent and unrelated to the above rational State policy which is central to this action. I have not suggested, as Mr. Emery would have this Court to believe, that just because Staten Island is still recognized as a county of the State the Island's borough president should be given a vote equal to the other borough presidents. Nor have I contended that simply because Staten Island has the greatest proportion of undeveloped land its residents should have their individual votes count more than the residents of the other boroughs. But the facts of the matter are that Staten Island is still a county of this State (one of the fastest growing in the State), it does hold the greatest proportion of undeveloped City-owned land and when these facts are considered in the context of blending borough and city-wide interests, that rational policy becomes vital to every Staten Islander. To destroy such a policy would, in effect, disenfranchise an entire county from the participation in local government decisions; decisions which have the most profound effect on the daily lives of that county's citizens.

8. The plaintiffs' own evidence confirms the fact that a strict application of a one person, one vote formula would reduce the status of Staten Island's representative on the Board to that of a "mere observer." It is this end result that I have characterized as a "tyranny of pure numbers." The alternatives that have been proposed in the plaintiffs' papers amount to no more than a "variation" on that "theme."

9. Thus, reduced to its lowest terms, this court must decide whether the long-standing policy of blending the

interests of each and every borough (or county) with city-wide interests, as advanced by the Board, should be allowed to continue, not simply in light of the City's history and geography, but most importantly, in light of the enormous impact that the Board's future decisions will continue to have on the citizens of the lesser populated counties of New York City.

10. For all the foregoing reasons, and all the papers that have previously been submitted, I respectfully request that this Court find that there are sufficient policies and interests that justify the present voting structure and allocation of seats on the Board of Estimate, as provided by sections 61 and 62 of the New York City Charter.

/s/ Robert A. Straniere
Robert A. Straniere

Sworn to before me this 2nd day of May, 1985.

/s/ Philip S. Straniere
Notary Public

Reply Affirmation of Frank V. Ponterio, Read in Partial Reply to the Affirmation and Exhibits in Support of Summary Judgment, dated May 2, 1985

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81 Civ. 3290 (ERN)

BEVERLY MORRIS, et al.,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE, et al.,

Defendants.

—and—

FRANK V. PONTERIO,

Intervenor-Defendant,

—and—

ROBERT A. STRANIERE, etc.,

Intervenor-Defendant.

Frank V. Ponterio, an attorney duly licensed to practice law in the State of New York affirms the following under penalty of perjury:

1. I am an intervenor-defendant in this action and have previously submitted my credentials to this Court.

Reply Affirmation of Frank V. Ponterio

2. This affirmation is submitted in partial reply to the Affirmation and Exhibits in Support of Summary Judgment, dated April 12, 1985, submitted by counsel for plaintiffs.

3. Although the current round of papers was supposed to address only the issue of justification for the Board malapportionment found by this Court, plaintiffs have submitted proposed remedies reflecting their application of a voting power analysis. This affirmation is limited to a refutation of the remedies portions of plaintiffs' submittal.

4. Plaintiffs now concede the fairness and constitutionality of proportional weighted voting power as an apportionment criterion. Counsel for plaintiffs states that representational schemes designed to apportion voting power in accordance with population percentages are "fully reflective of constitutional requirements". Affirmation of Richard Emery, p. 27.

5. It is important to bear in mind that equalizing representation (i.e., same number of citizens per legislator) and equalizing voting power (i.e., same percentage voting power as percentage of total population) are mutually inconsistent criteria where represented entities of considerably differing populations are represented in a single body. The very purpose of applying voting power apportionment is to give relatively small constituent entities a meaningful role in decision making that would otherwise be denied them if represensation were based on equalizing the number of citizens per legislator. Necessarily this results in large deviations in the apportionment criterion stated in *Reynolds* v. *Sims*, 377 U.S. 533 and mechanized and *Abate* v. *Mundt*, 403 U.S. 182.

6. In the affidavit of Professor Steven J. Brams in Support of Plaintiffs' Motion for Summary Judgment, Brams offers a remedy for Board malapportionment based on a weighted voting scheme, and presents accompanying voting power analyses. Brams' analyses are wrong and his remedy is unnecessary. The accepted methodology for performing voting power analyses has been described by another of plaintiffs' experts, Dr. Lee Papayanapoulos, as follows:

(a) List all voting combinations

(b) Count those which are critical to the first member; repeat for the second member, the third, etc.

(c) Add all counts obtained in (b)

(d) Divide each number in (b) by the sum (c) and multiply by 100. This is a percentage of the relative voting power of each member. Exhibit C to Affidavit of Donald J. Werner, Counsel to Edward J. Hart, Esq., attorney of record for defendant Nassau County Board of Supervisors in opposition to plaintiffs' multi-branched motion, *League of Women Voters* v. *Nassau County Board of Supervisors,* Eastern District Court, 82 C 1607 (J.M.).

These percentages are then compared with the population of each constituent municipality, expressed as a percentage of the total population represented by the board. In his affidavit, Brams departs from this procedure. Without explaining or justifying his departure, he computes a voting power percentage by dividing each borough member's counts, as in step (b), by the total of only borough member counts instead of dividing by the total of *all* counts,

as in step (d). This alleged measure of voting power is meaningless. It ascribes an aggregate voting power to borough members alone of 100%, as shown in Brams' table in paragraph 3., p. 2 of his affidavit. How can borough members hold 100% voting power when they have only 5 of the 11 Board Votes? Obviously, due to the presence of the city-wide members, the aggregate borough-member voting power in Brams' reconstituted Board is only 43.2%, as Brams himself acknowledges in paragraph 4., p. 2 of the same affidavit. Brams simply contradicts himself. He commits the same mistake in ascribing 20% voting power to each borough member on the Board as presently constituted. It is important to recognize, as Brams apparently does not, that a voting power analysis measures a member's ability to affect vote outcomes, and there are no vote outcomes of borough members alone. Brams blatantly misstates the Banzhaf voting power index. Banzhaf defines voting power as the ratio of the "number of possible voting combinations of the *entire body* (emphasis added) in which (a member) can alter the outcome by changing his vote" to the number of "All possible voting combinations for a given body". Banzhaf III, John F., "Multi-Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle", 75 Yale L.J. 1309, 1316. Of course, the Brams contradiction results from his attempt to extend this Court's two-tiered representation hypothesis to his purported voting power analysis. Whatever validity this hypothesis may hold for representational analyses, it has no validity to any sensible analysis of voting power. It is beyond argument that the Board votes as a single body. There is no clandestine under-Board composed only of borough members. The sole criterion for Board action is total Board votes. No distinction is made in the Board's

voting rules as to the origin of votes, except for the quorum rule, and that rule makes it even clearer that there is no such thing as borough-only voting power since it requires the presence of at least two city-wide members. Rule 6., Rules of Procedure for the Conduct of the Business of the Board of Estimate.

7. A voting power analysis of the full Board that follows the accepted analysis procedure and correctly computes percentages is shown in Table A. The norms against which deviations are measured are derived to account for the division of borough and city-wide voting power incorporated in the Board's voting rules. Accordingly, the norm voting power of each borough member is his corresponding borough's population percentage multiplied by the ratio of total borough votes to total Board votes (5/11). This gives an aggregate borough voting power of 5/11 or 45.45% divided among the boroughs in exact proportion to borough populations. The remaining voting power of 54.55% is divided equally among the three city-wide members (18.18% each). Without realizing it, Brams closely approaches this division of power in his proposed Board (43.2% and 56.8% respectively).* A comparable analysis of the Nassau County Board of Supervisors, taken from the Second Circuit's decision in *League of Women Voters* v. *Nassau County Board of Supervisors*, 737 F. 2d 155, 159 and supplemented to include that Board's 72-vote majority rule is shown in Table B. As is evident from Table A, the maximum deviation of voting power (12.08%) is negligibly larger than the 11.9% deviation approved in *Abate* and

* Had Brams designed a perfectly apportioned Board, its voting power apportionment division between borough and city-wide members would have been exactly 45.45% and 54.55% respectively.

TABLE A

VOTING POWER ANALYSIS
BOARD OF ESTIMATE (FULL BOARD)

Member	No. of Votes	Norm Vote Power*	Majority		2/3 Majority		3/4 Majority	
			Vote Power	% Deviation	Vote Power	% Deviation	Vote Power	% Deviation
Brooklyn	1	14.34	8.70	—5.64	9.09	—5.25	9.38	—4.96
Queens	1	12.16	8.70	—3.46	9.09	—3.07	9.38	—2.78
Manhattan	1	9.18	8.70	—0.48	9.09	—0.09	9.38	+0.20
Bronx	1	7.51	8.70	+1.10	9.09	+1.58	9.38	+1.87
Staten Island	1	2.26	8.70	+6.44	9.09	+6.83	9.38	+7.12
Mayor	2	18.18	18.84	+0.66	18.18	0	17.71	—0.47
Comptroller	2	18.18	18.84	+0.66	18.18	0	17.71	—0.47
Council Pres.	2	18.18	18.84	+0.66	18.18	0	17.71	—0.47
		100%	100%		100%		100%	

* Equal to % of total population × 5/11 for each borough member; 1/3 of remainder for each city-wide member

Maximum Deviation = 12.08% (All Cases)

TABLE B

VOTING POWER ANALYSIS
NASSAU COUNTY BOARD OF SUPERVISORS

Town	No. of Votes	Norm Vote Power	65-Vote Majority		72-Vote Majority	
			% Vote Power	% Deviation	% Vote Power	% Deviation
Hempstead	58	55.92	53.85	—2.07	52.17	—3.75
Oyster Bay	22	23.12	21.15	—1.97	19.57	—3.55
North Hempstead	15	16.53	17.31	+0.78	19.57	+3.04
Long Beach	7	2.58	5.77	+3.19	6.52	+3.94
Glen Cove	6	1.86	1.92	+0.06	2.17	+0.31

* Equal to % of total population

Maximum Deviation = 5.26% (65-Vote Majority); 7.69% (72-Vote Majority)

considerably less than the 16.4% deviation approved in *Mahan* v. *Howell,* 410 U.S. 315. Furthermore, in achieving this small deviation, the Board deviates less on a representational basis (by the *Abate* test) than does the Nassau County Board of Supervisors. *Abate* analyses of both Boards are shown in Tables C and D. As indicated, the Nassau County Board has a maximum deviation of 156.46% compared with 132.85% for the worst-case (i.e., borough-only) analysis of the Board of Estimate adopted by this Court. A corresponding voting power analysis of the mayorless Board with equivalently small deviations is shown in Table E.

No remedy is needed. No justification for current apportionment is needed. The Board as presently constituted meets the constitutional standards applied in *League of Women Voters,* and there is no rational basis for requiring the Board of Estimate to be judged by stricter constitutional standards than those applied to the Nassau County Board.

8. A few comments are in order with respect to the unthinking use of computers to manage human affairs and the undeserved reverence sometimes accorded ivory-tower academicians. Brams attempts to lend legitimacy to his flawed analysis by referring to his examination of "thousands upon thousands" of computer runs. In the era before computers, we analysts had to think problems through before creating large volumes of paper trash. Computers are useful for performing calculations but they are no substitute for the human mind. To illustrate, consider the Nassau County Board of Supervisors. It too is the product of thousands upon thousands of computer runs. Nevertheless, with paper and pencil and a mathematical expertise

TABLE C

ABATE ANALYSIS
BOARD OF ESTIMATE

Borough	1980 Population	No. of Members	Population Per Member	% Deviation From Norm
Brooklyn	2,230,936	1	2,230,936	—57.75
Queens	1,891,325	1	1,891,325	—33.74
Manhattan	1,427,533	1	1,427,533	— 0.94
Bronx	1,169,115	1	1,169,115	+17.33
Staten Island	352,121	1	352,121	+75.10
Totals	7,071,030	5	(Norm) 1,414,206	

Maximum Deviation = 132.85%

TABLE D

ABATE ANALYSIS
NASSAU COUNTY BOARD OF ESTIMATE

Town	1980 Population	No. of Members	Population Per Member	% Deviation From Norm
Hempstead	738,517	2	369,258.5	—67.64
Oyster Bay	305,750	1	305,759	—38.81
No. Hempstead	218,624	1	218,624	+ 0.74
Long Beach	34,073	1	34,073	+84.53
Glen Cove	24,618	1	24,618	+88.82
Totals	1,321,582	6	(Norm) 220,263.67	

Maximum Deviation = 156.46%

TABLE E

VOTING POWER ANALYSIS
BOARD OF ESTIMATE (MAYORLESS BOARD)

Member	No. of Votes	Norm Vote Power*	Majority		2/3 Majority	
			Vote Power	% Deviation	Vote Power	% Deviation
Brooklyn	1	17.53	10.77	—6.76	10.71	—6.82
Queens	1	14.86	10.77	—4.09	10.71	—4.15
Manhattan	1	11.22	10.77	—0.45	10.71	—0.51
Bronx	1	9.19	10.77	+1.58	10.71	+1.52
Staten Island	1	2.77	10.77	+8.00	10.71	+7.94
Comptroller	2	22.22	23.08	+0.86	23.21	+0.99
Council Pres.	2	22.22	23.08	+0.86	23.21	+0.99
		100%	100%		100%	

* Equal to % of total population × 5/9 for each borough member; 1/2 of remainder for each city-wide member

Maximum Deviation = 14.76% (Both Cases)

limited to the ability to add, it is a simple matter to prove that Glen Cove can cast a critical vote only if Hempstead's two members vote against each other. Except in this extremely unlikely circumstance, Glen Cove's voting power is zero. So much for computerniks.

9. Based upon a) plaintiffs' concession that voting power is an appropriate measure of Board apportionment, b) the Second Circuit's decision in *League of Women Voters* upholding the apportionment of a board with greater representational deviations than the Board of Estimate, and c) the foregoing voting power analysis, it is respectfully requested that plaintiffs' motion for summary judgment be denied, and that this Court reconsider its decision on the degree of current Board malapportionment and find that Board apportionment is facially constitutional, even absent any justification based upon legitimate state interests.

Dated: Staten Island, N.Y.
May 2, 1985

/s/ FRANK V. PONTERIO
Frank V. Ponterio
Intervenor-defendant, *pro se*

Supplemental Reply Affirmation of Frank V. Ponterio, Read in Reply to a Letter With Enclosures, from Richard Emery to This Court, dated May 17, 1985

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81 Civ. 3290 (ERN)

BEVERLY MORRIS, et al.,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE, et al.,

Defendants.

—and—

FRANK V. PONTERIO,

Intervenor-Defendant,

—and—

ROBERT A. STRANIERE, etc.,

Intervenor-Defendant.

Frank V. Ponterio, an attorney duly licensed to practice law in the State of New York affirms the following under penalty of perjury:

1. I am an intervenor-defendant in this action and have previously submitted my credentials to this Court.

2. This affirmation is submitted in reply to a letter, with enclosures, from Richard Emery, Esq. to this Court, dated May 17, 1985.

Supplemental Reply Affirmation of Frank V. Ponterio

3. By agreement among the parties and the Court, I was permitted one week to respond after receipt of the Emery letter and enclosures. That material was received by me on May 22, 1985, therefore service and filing of this affirmation on or before May 29, 1985 is timely.

4. The day after receiving the Emery letter, I contacted Professor John F. Banzhaf III by telephone in an effort to assist the Court in resolving the differences between Brams' analyses and mine, and to put an end to the litany of criticism and counter-criticism over methodology issues. I supplied Prof. Banzhaf with copies of Reply Affirmation of Intervenor Defendant Ponterio, dated May 2, 1985, Exhibits D and E to Emery's Affirmation and Exhibits in Support of Summary Judgment, dated April 12, 1985 (the Papayanopoulos and Brams exhibits), annotated computer printouts of the results of my voting power analyses, and Rules of Procedure of the Board of Estimate. I also described briefly the history of this action from its inception. This contact resulted in Banzhaf's letter to this Court dated May 22, 1985.*

5. Brams' accusation that I am "badly confused," Memorandum, Brams to Emery, dated May 10, 1985, para. 1., is put to rest by paragraphs 2. and 3. of the Banzhaf letter. Banzhaf recites the identical criticisms of Brams' purported Banzhaf voting-power index calculations as I did in my previous affirmation. It is obviously Brams, not I, who is confused.

6. Banzhaf also states in paragraphs 1. and 4. of his letter that the methodology I used to quantify current

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* Attached hereto as Exhibit 1.

Board malapportionment (my "norm vote power" percentages) has no mathematical basis. I don't disagree. The relevant point is that, whether it has a mathematical basis or not, it follows the method used by the Courts in a line of cases from *Ianucci* v. *Board of Supervisors of the County of Washington,* 282 N.Y.S. 2d 502 (1967) to *League of Women Voters* v. *Nassau County Board of Supervisors,* 727 F.2d 155 (1984). To form a perfectly apportioned Board consistent with these decisions, I simply divided the 45.45% borough voting power among the boroughs in accordance with their population percentages. Banzhaf's quarrel is not with my methodology but with the Courts'. It is a restatement of his contention that equal representation for districts of equal size is not achieved by equalizing the number of legislators per citizen-voter. Banzhaf cites an example of two districts. One district has 10,000 people and one representative. A second district has 40,000 people and four representatives.

> "Proponents will argue that the voters are equally represented because . . . there is one representative for every 10,000 people. Despite its simplistic appeal, this argument is fallacious.
>
> There is no justification here for simple division; the resulting product has no meaning. Although at first glance it might seem to be a logical operation, there is no mathematical theory to support it."
>
> "Multi-Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle," 75 Yale L.J. 1309, 1329.

Nevertheless, the Courts have decided repeatedly that equality of representation is achieved by such simple division and, more to the point, that equality of voting power is achieved by apportioning the voting power of district representatives on a board in a accordance with district population percentages, and not by equalizing the voting power of individual citizens by Banzhaf's or any other method. The near-perfectly-apportioned Board that Brams proposes, like mine, follows these Court decisions, as is evident when voting power is computed correctly.

7. Banzhaf recommends that voting power apportionment of the Board be decided by applying a different measure from that used by the Courts in *Ianucci* and *League of Women Voters.* The measure is *citizen* voting power as distinguished from *district* voting power. District voting power as applied in *League* is simply the ability of a Board member to affect the outcome of Board votes. It takes no account of the voting power of citizens to elect their district representatives (district populations are used only to establish the standards against which deviations are measured). Banzhaf's proposed measure, viz., citizen voting power, is the ability of each citizen to affect the outcome of Board votes acting through his representatives. Calculation of this measure is a two-step procedure. First, a calculation is made of an individual citizen's ability to affect the outcome of the election of his representative. Banzhaf demonstrates that this ability is equal to $1\sqrt{2 \top\top N}$, where N is the district population *Id.*, fn. 28. at 1323. Second, a calculation is made of the ability of that representative to affect Board vote outcomes, exactly as is done, for example, in *League.* The product of these two indices is defined as a citizen's voting power, i.e., his ability to affect Board vote outcomes via his representative. This methodology rests on Banzhaf's contention that equality

of "effective" representation is achieved for districts of unequal population when the number of representatives, or votes, is apportioned according to the square-root of population, not according to population itself. For the current Board, traditional apportionment methodology would dictate that Brooklyn have six times as many representatives or votes as Staten Island because it has six times Staten Island's population. Banzhaf's methodology would dictate that Brooklyn have 2½ ($\sqrt{6}$) times as many representatives or votes as Staten Island. This methodology, mathematically pure as it may be, was explicitly rejected by the Supreme Court in *Whitcomb* v. *Chavis,* 403 U.S. 124 (1971).

8. The relevant point is that the desire for mathematical purity should not completely displace common sense, no matter which methodology is used. No methodology is free of serious flaws. Banzhaf's criticism of the *Abate* equal-number-of-citizens-per-legislator criterion is soundly based in mathematics. District voting power analyses such as used in *League* rely upon an *a priori* assumption that all combinations of Board votes are equally probable, and exclude fundamental real-life factors such as bloc voting, give-and-take exchanges among members, and a host of political influences. Use of *a priori* assumption is justified when nothing is known about the true operation of a board. After decades of experience with the Board of Estimate and the Nassau County Board, use of such *a priori* assumptions is indefensible. As for Banzhaf's citizen voting power analysis, it also rests on shakey assumptions. It assumes, for example, that each board member's vote follows the will of a majority of his constituents (as if the result of a poll of constituents on each vote). Applying

this assumption to the Board leads to a result that is obviously untrue. Since the three city-wide members have the same constituency, the Banzhaf assumption implies that they always vote alike. Of course they do not. And if they did, all borough members would have zero voting power since the three city-wide members control a majority of votes. The list is endless. In fairness to Banzhaf, it should be noted that he states his assumptions in his several law journal articles on this subject. However, once stated, they are put aside. The plain fact is that the results of all apportionment analyses are more dependent on the assumptions that underlie them than the mathematical formulas that implement them. Real people don't conduct themselves to suit the formulas of mathematical purists. Common sense is an essential ingredient in both the selection and application of any analysis method.

9. Fortunately, this battle of methodologies is a tempest in a teapot. As will become evident, whether the Court-sanctioned district voting power analysis or Banzhaf's methodology is applied to the Board, the result is the same. Malapportionment of the Board is small, and within constitutional bounds.

I have performed a number of additional analyses in response to Banzhaf's recommendations. First, I have computed the Banzhaf citizen voting power index for the Board of Estimate and the Nassau County Board of Supervisors. For the Board of Estimate, a citizen's voting power is the sum of his ability to affect Board vote outcomes via the city-wide members (the same for all citizens) and his ability to affect such outcomes via his borough president (different in each borough). In particular:

Supplemental Reply Affirmation of Frank V. Ponterio

Citizen Voting Power = power to elect mayor × mayor's vote power
+ power to elect comptroller × comptroller's vote power
+ power to elect council president × council president's vote power
+ power to elect borough president × borough president's vote power

Table A presents the comparative results. The Board is shown to be not seriously malapportioned and far better apportioned than the Nassau County Board. The result is not surprising since the Nassau County Board was apportioned without consideration of the ability of each citizen to elect his board member and that ability varies greatly among the Nassau towns. It also varies greatly among the five boroughs, but the influence of the borough members is diminished by the presence of the city-wide members (each affects only about 9% of board votes while city-wide members affect 55% of votes, and citizen voting power as to city-wide members is the same for all citizens).

Supplemental Reply Affirmation of Frank V. Ponterio

TABLE A

Current Board of Estimate
(Full-Board, Simple Majority)

Citizen voting power = $\sqrt[1]{2 \pi N^1}$, where N = population of district (borough or city)

Power of citizen to elect a city-wide member = .00015003 (N = 7,071,030)

Combined voting power of 3 city-wide members = 56.52%

Citizen voting power via 3 city-wide members = .0001500 × .5652 = .00008480

Borough	Citizen's Power to Elect Borough Member	Borough Member Voting Power	Citizen's Voting Power Via Borough Member	Citizen's Total Voting Power Via All Members	% Deviation From Average Voting Power
Brooklyn	.0002671	.08696	.000023226	.00010803	— 4.36
Queens	.00029009	.08696	.000025225	.00011002	— 2.59
Manhattan	.0003339	.08696	.000029035	.00011383	+ 0.78
Bronx	.00036896	.08696	.000032083	.00011688	+ 3.48
Staten Is.	.0006723	.08696	.000058461	.00014326	+26.84

Population-Weighted Average Total Voting Power = .00011295
Maximum Deviation = 4.36 + 26.84 = 31.20%

Nassau County Board of Supervisors
(65-Vote Majority)

Town	Citizens Power to Elect Supervisor	Supervisor Vote Power	Citizen's Voting Power	% Deviation From Average Voting Power
Hempstead	.00046423	.5385	.00024999	+22.81
Oyster Bay	.00072148	.2115	.00015259	—25.04
N. Hempstead	.00085322	.1731	.00014769	—27.45
Long Beach	.00216125	.0577	.0001247	—38.74
Glen Cove	.00254263	.0192	.00004882	—76.02

Population-Weighted Average Voting Power = .00020356
Maximum Deviation = 22.81 + 76.02 = 98.83%

Second, I have synthesized a Board apportioned in accordance with Banzhaf's square-root theory for equalizing citizen voting power and used it as a standard against which to measure deviations in borough member's voting power on the current Board. Taking Staten Island as a unit district, the number of votes assigned to each borough member is as follows:

Borough	Ratio of Population to Population of Staten Is. (N)	Equalized No. of Votes ($\sqrt{N}$)	Assigned No. of Votes ($10\sqrt{N}$)*
Brooklyn	6.336	2.517	25
Queens	5.371	2.318	23
Manhattan	4.054	2.013	20
Bronx	3.320	1.822	18
Staten Is.	1.000	1.000	10
		Total	96

* Scaling by factor of 10 used to avoid fractional votes

The city-wide members are assigned 39 votes each so that the total number of Board votes is 213 (and the split between city-wide and borough votes is 55%—45% as on the current Board). A majority is taken as 117 votes (the sum of all city-wide votes as with the current Board). Table B shows the voting power of each member of the current Board, the corresponding voting power for synthesized "perfectly apportioned" boards following Court-sanctioned methodology (Brams and Ponterio boards) and the Banzhaf methodology. Also shown are the deviations of voting power on the current Board measured against each of the "perfect" Boards. It is obvious that it is un-

necessary to grapple with theoretical mathematical controversies. The results are virtually the same no matter which theory of equalization is embraced. It should be noted that the only difference between the Brams and Ponterio boards is that Brams attempted to find a specific embodiment of a perfect Board and fell slightly short of perfection, while I simply defined the theoretically perfect percentages without attempting to implement them. My board is simply the goal that Brams sought. In any event, the differences are trivial.

Supplemental Reply Affirmation of Frank V. Ponterio

TABLE B

BOROUGH VOTING POWER AND DEVIATIONS (%)

Board Member	Current Board	"Banzhaf" Board Power	"Banzhaf" Board Dev.	Brams Board Power	Brams Board Dev.	Ponterio Board Power	Ponterio Board Dev.
Brooklyn	8.7	11.6	—2.9	13.6	—4.9	14.3	—5.6
Queens	8.7	11.6	—2.9	11.4	—2.7	10.9	—2.2
Manhattan	8.7	9.3	—0.6	9.1	—0.4	9.2	—0.5
Bronx	8.7	7.0	+1.7	6.8	+1.9	7.5	+1.2
Staten Island	8.7	2.3	+6.4	2.2	+6.5	2.3	+6.4

Maximum Deviations

"Banzhaf": 2.9 + 6.4 = 9.3%
Brams: 4.9 + 6.5 = 11.4%
Ponterio: 5.6 + 6.4 = 12.0%

Note: Because of the effects of the city-wide members on board voting power, assigning borough votes in accordance with the square-root theory does not necessarily ensure equalized *total* (via city-wide and borough members) citizen voting power. In this sample, the deviations are small (under 4%) except for Staten Island which is under-represented by 12.4%. Time did not permit the several iterations that are required to yield a better result. If a perfect result were obtained, i.e., equal *total* citizen voting power, the comparison would be as shown below:

BOROUGH VOTING POWER AND DEVIATIONS (%)

Board Member	Current Board	Perfect "Banzhaf" Board Power	Perfect "Banzhaf" Board Dev.
Brooklyn	8.7	11.83	—3.13
Queens	8.7	10.89	—2.19
Manhattan	8.7	9.46	—0.76
Bronx	8.7	8.56	+4.00
Staten Island	8.7	4.70	+4.00

Maximum Deviation = 3.13 + 4.00 = 7.13%

Supplemental Reply Affirmation of Frank V. Ponterio

Finally, I have extended the calculations of individual citizen voting power to determine the aggregate citizen voting power of each borough (acting through its borough member and all three city-wide members). This is done simply by adding up the citizen voting power of all the citizens in each borough. The results are shown in Table C. It is obvious that the differences between aggregate borough voting powers and corresponding borough population percentages are remarkably small (maximum deviation less than 3%).

TABLE C

BOARD OF ESTIMATE
AGGREGATE CITIZEN VOTING POWER OF BOROUGHS

Borough	Aggregate Citizen Voting Power Numerical	Aggregate Citizen Voting Power % of Total	Population Percentage	Percent Deviation
Brooklyn	240.998	30.17	31.55	—1.38
Queens	208.093	26.05	26.75	—0.70
Manhattan	162.502	20.35	20.19	+0.16
Bronx	136.650	17.11	16.53	+0.58
Staten Is.	50.445	6.32	4.98	+1.34
Total	798.689			

Maximum Deviation = 1.38 + 1.34 = 2.72%

10. Although I am not confused by Brams' flawed attempts at arithmetic, I am nevertheless confused by the obvious disarray of arguments on plaintiffs' side. Emery's May 17, 1985 letter objects to my characterization of his weighted-vote Board as a "proposed remedy". Nevertheless, Emery, referring to Brams' proposed board, states "To this end plaintiffs have offered a Board scheme which

respects population and the essence of meaningful participation by the lesser populated boroughs". Affirmation and Exhibits in Support of Summary Judgment, p. 44-5. Emery also submits with his letter a 100 or so page collection of papers dealing largely with remedies. Emery's May 17, 1985 letter states at page 3 that the Board "is simply not a weighted voting scheme" and "is not appropriately analyzed under such a method". Brams, on the other hand, not only characterizes the current Board as an "arbitrary 'weighted' voting scheme" but goes on to analyze it (although incorrectly) by a weighted voting method. Exhibit E to Affirmation and Exhibits in Support of Summary Judgment at paragraph 10., page 4. In its May 21, 1985 letter to this Court, plaintiffs' amicus claims that I erred in computing voting power deviations because I failed to divide the difference between actual vote power and "norm" vote power by a population-related figure. In doing so, plaintiffs' amicus contradicts plaintiffs' own expert, Papayanopoulos, and advances the very calculation that was rejected in *League of Women Voters,* 727 F.2d fn. 15 at 168. Brams also uses the calculation method rejected by the Second Circuit when he characterizes Staten Island's "relative deviation" as 285% $\frac{(20\%-5.2\% \times 100)}{5.2\%}$ instead of 14.8% (20%-—5.2%) in his own flawed arithmetic. In doing so, he contradicts himself since, for his proposed board, he computes "relative deviation" as the difference between voting power and population percent without dividing by population percent (paragraph 3., page 2 of his Exhibit).

Emery charges me with blame for attempting to relitigate the methodology issue, but it was he who introduced voting power analyses into these proceedings and necessitated my reply. Plaintiffs no doubt now realize that one of the dangers of shooting from the hip is that you might blow away your toes.

11. The comments of Prof. Banzhaf and my further analyses have, I believe, helped to clarify the methodology issues in this case and make it even more apparent that the Board is in no need of fixing.

/s/ Frank V. Ponterio
Frank V. Ponterio, pro se
Intervenor-defendant
766 Pelton Avenue
Staten Island, N.Y. 10310
(718) 981-7953

Dated: Staten Island, NY
May 29, 1985

Exhibit (1): Annexed to the Supplemental Reply Affirmation of Frank V. Ponterio Submitted to the United States District Court, Eastern District of New York

LETTER FROM JOHN F. BANZHAF, III, TO EDWARD R. NEAHER, CIRCUIT JUDGE, DATED MAY 22, 1985

[Letter Head of The George Washington University]
Washington, D.C. 20052/The National Law Center

Mailing address:
2013 H St. NW
Washington, D.C. 20006
(202) 659-4310

By Express Courier
Overnight Delivery

May 22, 1985

Honorable Edwin Neaher
U.S. District Court
Eastern District of New York
225 Kadman Plaza East
Brooklyn, New York 11201

Dear Judge Neaher:

Re: *Morris* v. *Board of Estimates*, 81 Civ. 3920 (ERN)
Letter in the Nature of Brief Amicus Curiae and Motion for Leave to File Same

I have just learned of the existence of the above-entitled action, and have had an opportunity to read only a few of the submissions in the proceeding on remand to "determine the degree of malapportionment present."

Exhibit 1 Annexed to the Supplemental Reply Affirmation of Frank V. Ponterio

Although I am the inventor and popularizer of the "Banzhaf voting power index," have frequently testified on voting power issues, and have a considerable mathematical background by virtue of an engineering degree from M.I.T., I experienced considerable difficulty in trying to interpret some of the mathematical analyses submitted to the Court. Believing that the Court may likewise experience the same difficulty, I am taking the liberty of writing this letter to briefly offer several views which may be of interest and value to the Court.

This submission is made in the form of a letter only because I understand that a decision by the Court may be imminent. If the Court requires that a formal motion and brief *amicus curiae* be prepared, or that my comments be submitted in the form of an affidavit (as other analyses were), I will, of course, be happy to comply.

My brief comments are as follows:

1. I see no sound mathematical basis for the calculations made by Intervenor Ponterio to determine what he calls the "norm voting power of each borough member" as described on page 5 of his affidavit dated May 2, 1985, and as used in Table A on page 6 of the same affidavit as the basis for his calculation of % deviation (and which tend to support his view that the deviations are small).

2. On the other hand, the figures for "Banzhaf Voting Power %" on page 2 of Professor Steven J. Brams' affidavit dated April 9, 1985 obviously do not represent the Banzhaf-index-calculated voting power of each of the representatives from the five boroughs since the total of the five figures (5.3 to 31.6) is 100%, even though more than half the voting power of the eight-member board lies in the hands (or votes) of the three citywide members. In-

stead, the Banzhaf voting power indexes for five of the eight members of the body have been multiplied by a factor to make them add up to 100%.

3. Intervenor Ponterio apparently objects to this form of analysis—particularly as it is applied to the existing board—since it does not take into account the undisputed fact that the election of citywide members with considerable voting power substantially reduces the effective disparity in voting power between citizens of the five unequal-sized boroughs. For example, as I understand Prof. Brams' technique of analysis, he would find significant "relative-deviation overrepresentation" for Staten Island, and significant "relative-deviation underrepresentation" for Brooklyn, even if there were ten, twenty, or even more citywide members who collectively had 80, 90, or even 95% of the voting power on the body.

4. On the other hand, I am equally unpersuaded by Intervenor Ponterio's attempts to mathematically justify a body on which the votes of the representative from Brooklyn with 2,230,936 residents are equal to the votes of representative from Staten Island with only 352,121 residents.

5. In summary, my initial reading leads me to believe that both techniques of analysis are incorrect and incomplete, particularly when applied to this new situation in which some of the legislators represent all of the people, and others represent only political subdivisions, and both cast weighted votes in the same legislative body.

6. Without necessarily suggesting that it is necessary for this Court to venture even further into the "mathematical quagmire," and mindful that "mathematical exactness or precision is hardly a workable constitutional requirement," it does appear that the Second Circuit's mandate to decide on the "appropriate methodology" for determining the "degree of malapportionment present" does raise "novel issues as to how an individual voter's opportunity to elect these members should be assessed in conjunction with his opportunity to elect his borough representative" [fn 3]. With all due respect, it appears that neither Intervenor Ponterio nor Prof. Brams has seriously addressed—much less clearly resolved—this "novel issue."

7. Fortunately, I have previously developed and written about a more advanced mathematical technique to analyze just such issues in a somewhat analogous context, the Electoral College. See Banzhaf, *One Man, 3.312 Votes, A Mathematical Analysis of the Electoral College,* 13 Villanova L. Rev. 303 (1968). By using a relatively simple extension of my mathematical technique mandated by the New York Court of Appeals in *Iannucci* v. *Board of Supervisors,* 282 N.Y.S.2d 502 (1967), it is possible to calculate the relative ability of a citizen voter to affect the outcome of legislation being considered by a weighted voting body. In this sense the Electoral College (with state-imposed "winner-take-all" voting requirements) is a legislative body employing weighted voting (albeit to make only one decision).

8. I have subsequently used the same more advanced technique of analysis to examine other voting situations, see Banzhaf, *One Man, ? Votes: Mathematical Analysis of Voting Power and Effective Representation,* 36 Geo. Wash. L. Rev. 808 (1968). Using this technique, it is pos-

sible to calculate the relative voting powers of citizens residing in the five different boroughs, and to expressly and precisely take into account that they vote both for citywide representatives and for an additional representative for their own borough.

9. The technique which I have described in these articles is mathematically reasonably simple, and can be carried out easily by any person skilled in the art. For these reasons, the Court may wish to request that one or more of the parties also carry out this form of analysis, and present the results to the Court for its consideration.

10. It is possible, of course, that one or more of the parties may disagree with this type of analysis, and indeed that the Court itself may find the results disquieting. On the other hand, it is a more precise and exact mathematical technique designed expressly to deal with situations such as this, rather than ad hoc extensions of techniques designed to deal with very different situations upon which the parties have apparently relied. In any event, even if the results are not dispositive of the issue of the degree of malapportionment, they may be of value to the Court in resolving the complex issues before it, and in insuring the most complete possible record before the Court of Appeals if review is again sought.

In closing, I wish to assure the Court that I have no direct interest in the outcome of this legislation, nor am I being compensated by—nor seeking compensation from—any of the parties or organizations with such an interest. In short, I have submitted this letter to the Court, and would be willing to further assist the Court in any way appropriate, solely because of my long-standing interest

in voting problems, and my view that it is appropriate for a professor of law to assist courts in matters involving the public interest in which they may have something of value to offer.

I trust the Court will be kind enough to advise me of any action it takes regarding this letter.

Respectfully submitted,

/s/ John F. Banzhaf III
John F. Banzhaf
Professor of Law
(202) 659-4310

JFB:fdr

cc:

Richard Emery, Esq., Counsel for Plaintiffs
Frederick A. O. Schwartz, Jr., Esq.,
Corp. Counsel for N.Y.C.
Hon. Robert A. Straniere, Intervenor-defendant *pro se*
Hon. John Marchi, *Amicus Curiae*
Alan Rothstein, Esq., Counsel for Citizens Union
Frank V. Ponterio, Intervenor-defendant *pro se*

Letter from Mr. Marchi to Edward R. Neaher, Circuit Judge, dated June 11, 1985

John J. Marchi
Attorney at Law
358 St. Marks Place
Staten Island, N.Y. 10301
273-4848

June 11, 1985

Hon. Edward R. Neaher
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, N.Y. 11201

Re: *Morris* v. *Board of Estimate*
81 Civ. 3920

Dear Judge Neaher:

I am writing regarding two submissions recently made to the Court concerning the above captioned case. Mr. Emery provided the Court with some material prepared for and used at a seminar on the governance of New York City sponsored by the Association of the Bar of the City of New York. I was a participant at that seminar. While the written material is certainly interesting and in many ways informative without a transcript or tape of the seminar's oral discussions the material is incomplete and in some ways misleading. Unless a transcript or tape is made available to the Court, I respectfully request that none of the written material be considered.

With respect to Professor Banzhaf's motion to participate as an *Amicus Curiae,* I have no objection. Professor

Letter from Mr. Marchi to Edward R. Neaher, Circuit Judge, dated June 11, 1985

Banzhaf's acknowledged expertise in areas relevant to our case could prove valuable to the Court.

Sincerely,

/s/ John J. Marchi
John J. Marchi

CC: Richard Emery, Esq.
Susan Rosenberg, Esq.
Alan Rothstein, Esq.
Robert Straniere, Esq.
Frank Ponterio, Esq.